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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1380

CHEMEHUEVI TRIBE OF INDIANS, ET AL., *Petitioners*

v.

FEDERAL POWER COMMISSION, *Respondent*

No. 73-1666

ARIZONA PUBLIC SERVICE COMPANY, ET AL., *Petitioners*

v.

CHEMEHUEVI TRIBE OF INDIANS, ET AL., *Respondents*

No. 73-1667

FEDERAL POWER COMMISSION, *Petitioner*

v.

CHEMEHUEVI TRIBE OF INDIANS, ET AL., *Respondents*

Petitions for Certiorari Filed March 11, 1974, and May 6, 1974
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BRIEF OF
ARIZONA PUBLIC SERVICE COMPANY, ET AL.

(See list of attorneys on inside cover)

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

NORTHCUTT ELY
FREDERICK H. RITTS
Law Offices of Northcutt Ely
Watergate 600 Building
Washington, D. C. 20037
and
HARRY A. POTH, JR.
PEYTON G. BOWMAN, 3RD
Reid & Priest
40 Wall Street, New York,
N.Y. 10005

1701 K Street, N. W.
Washington, D. C. 20006
Attorneys for all Petitioners

NICHOLAS H. POWELL
Snell & Wilmer
400 Security Building
Phoenix, Arizona 85004
Attorneys for Arizona Public Service Company

WILLIAM DUNCAN
Kemp, Smith, White, Duncan & Hammond
P. O. Box 2800
El Paso, Texas 79999
Attorneys for El Paso Electric Company

BURT S. PINES, City Attorney
EDWARD C. FARRELL, Chief Assistant City Attorney for Water and Power

RALPH GUY WESSON
Assistant City Attorney
111 North Hope Street
Los Angeles, California 90051
Attorneys for Department of Water and Power, City of Los Angeles

M. GENE MATTEUCCI
P. O. Box 230
Las Vegas, Nevada 89101
Attorney for Nevada Power Company

REX E. LEE
2840 Iroquois Drive
Provo, Utah 84601
Jennings, Strouss & Salmon
111 W. Monroe Street
Phoenix, Arizona 85003
Attorneys for Salt River Project Agricultural Improvement and Power District

SHERMAN CHICKERING
C. HAYDEN AMES
EDWARD P. NELSEN
ALLAN J. THOMPSON
Chickering & Gregory
111 Sutter Street
San Francisco, California 94104
Attorneys for San Diego Gas & Electric Company

JOHN R. BURY
Assistant General Counsel
P.O. Box 800
Rosemead, California 91770
Attorney for Southern California Edison Company

L. V. ROBERTSON, JR.
General Attorney
Tucson Gas and Electric Company
220 West Sixth Street
Tucson, Arizona 87503

DONALD E. DICKERMAN
Holesapple, Conner, Jones, McFall & Johnson
P.O. Box 310
Tucson, Arizona 85702
Attorneys for Tucson Gas & Electric Company

SIDNEY G. BAUCOM
ROBERT GORDON
P. O. Box 899
Salt Lake City, Utah 84110
Attorneys for Utah Power & Light Company

TABLE OF CONTENTS

Page

Opinions Below 1

Grounds On Which Jurisdiction Is Invoked 2

Questions Presented For Review 2

Provisions Of Statutes and Interstate Compacts ... 4

Statement of the Case 5

Summary of Argument 13

Argument 20

I. The Judgment of the Court of Appeals Should Be Reversed and Vacated for Lack of a Justiciable Controversy 20

A. The elements of justiciability 20

B. Section 4(e) of the Federal Power Act has no application to the consumptive use of waters of the Colorado River System, having been superseded by legislation which delegates exclusively to the Secretary of the Interior all federal authority relating to the consumptive use of such waters from government dams. He has exercised that authority by his contracts 21

C. The decision below should be reversed and vacated as a moot advisory opinion, not applicable to the case before the Court 38

D. All of the complainants lack standing to litigate the issue of jurisdiction between the Secretary and the Commission 39

II. The Rationale of the Court's Proper "Project Works" Holding Should Have Controlled Its Disposition of the "Surplus Water" Issue ... 44

A. The text of the act plainly relates only to hydroelectric projects, to the exclusion of thermal plants, regardless of the source of the water that they use 44

Page

B. The opinion below conflicts with decisions made by Congress in 1935 in amending the Federal Water Power Act 47

C. Prior construction of the Federal Power Act by this Court removes any doubt as to the act's inapplicability to the licensing of fossil-fuel steam plants 52

D. The administrative construction of the act, reported to Congress for more than a half-century, has consistently related the Commission's licensing jurisdiction solely to hydroelectric power, with no exception for thermal plants using surplus water from government dams 53

III. The Legislative History of the Federal Water Power Act Proves That Congress Authorized the FPC to Regulate Only Hydroelectric Utilization of Surplus Water from Government Dams, and that Congress Specifically Refused to Include in the Water Power Act Plenary Authority Over Other Water Uses 55

A. Early legislation, bills leading to enactment of the Federal Water Power Act, and congressional debates all show that Congress was only concerned with use of surplus water in generating hydroelectric power .. 55

B. Contrary to the court of appeals' assumption, the Federal Power Commission did not inherit the broad "spectrum" of responsibilities for water use planning that had been previously assigned to the Waterways Commission. Those responsibilities, in any event, did not include issuing licenses for water power, steam power, or any other water uses 70

Conclusion 75

Page

ATTACHMENT A: STATUTES AND COMPACTS 78

Federal Power Act 78

Boulder Canyon Project Act 81

Reclamation Project Act of 1939 84

Colorado River Storage Project Act 85

Navajo-San Juan Chama Project Act 87

Act of March 22, 1968, Pub.L. 90-272 90

Colorado River Basin Project Act 92

Colorado River Compact 95

Upper Colorado River Basin Compact 96

SUPPLEMENT (Bound separately)

CITATIONS

CASES:

Alabama Power Company, 34 F.P.C. 1108 (1965) 12

American Public Power Association, et al. v. *Power Authority of the State of New York*, 355 U.S. 64 (1957) 39

Arizona v. *California*, 298 U.S. 558 (1936) 27, 33

Arizona v. *California*, 373 U.S. 546 (1963) 6, 15, 21, 22, 26, 27

Arizona v. *California*, 376 U.S. 340 (1964) 6, 10, 15, 16, 21, 27, 30, 40, 41, 42

Baker v. *Carr*, 369 U.S. 186 (1962) 38

Board of Public Utility Commissioners v. *Cia. General de Tabascos*, 249 U.S. 425 (1919) 39

Brownlow v. *Schwartz*, 261 U.S. 216 (1923) 39

Bryan v. *Austin*, 354 U.S. 933 (1957) 39

California Oregon Power Co., 13 F.P.C. 1 (1954), 15 F.P.C. 14 (1956) 51

California Oregon Power Co. v. *FPC*, 239 F.2d 426 (D.C. Cir. 1956) 51

Chemehuevi Tribe of Indians, et al. v. *Federal Power Commission*, 489 F.2d 1207 (D.C. Cir. 1973) 1

Page

FPC v. *Niagara Mohawk Power Corp.*, 347 U.S. 239 (1954) 52
FPC v. *Union Electric Co.*, 381 U.S. 90 (1965) ...10, 17, 18, 52, 53
First Iowa Hydro-Electric Cooperative v. *FPC*, 328 U.S. 152 (1946) 52
Flast v. *Cohen*, 392 U.S. 83 (1968) 20
Garcia v. *Landon*, 348 U.S. 866 (1954) 39
Gilligan v. *Morgan*, 413 U.S. 1 (1973) 20, 38
Green Mountain Power Corp., 13 F.P.C. 1211 (1954) .. 12
Jicarilla Apache Tribe of Indians, et al. v. *Morton, et al.*, 3 ERC 1919 (D. Ariz. 1972), *aff'd*, 471 F.2d 1275 (9th Cir. 1973) 7, 8, 9, 10, 40
Kaukauna Water Power Co. v. *The Green Bay & Mississippi Canal Company*, 142 U.S. 254 (1891).. 57
McKay v. *Clackamas County*, 349 U.S. 909 (1955) 39
Poe v. *Ullman*, 367 U.S. 497 (1961) 20
Power Reactor Development Co. v. *International Union*, 367 U.S. 396 (1961) 55
St. Louis, Iron Mountain & Southern Ry. Co. v. *United States*, 251 U.S. 198 (1920) 58
Udall v. *Tallman*, 380 U.S. 1 (1965) 55
United States v. *Alaska S.S. Co.*, 253 U.S. 113 (1920) .. 39
United States v. *Anchor Coal Co.*, 279 U.S. 812 (1929) 39
United States v. *Munsingwear, Inc.*, 340 U.S. 36 (1950) 39
Utah Power & Light Co., 31 F.P.C. 958 (1964) 12
Yazzie, et al. v. *Morton, et al.*, 59 F.R.D. 377 (1973) .. 7

STATUTES, INTERSTATE COMPACTS, AND TREATIES

Mexican Water Treaty, T.S. 994, 59 Stat. 1219 (1944) 21, 22

Boulder Canyon Project Act
Section 5, 43 U.S.C. § 617d 23, 26, 27
Section 6, 43 U.S.C. § 617e 25, 56
Section 13, 43 U.S.C. § 617*l* 26
Boulder Canyon Project Adjustment Act of 1940
Section 2, 43 U.S.C. § 618a 26, 49
Clean Air Act, 42 U.S.C. § 1857 40
Colorado River Basin Project Act of 1968
Section 102, 43 U.S.C. § 1501 30
Section 301, 43 U.S.C. § 1521 41
Section 303, 43 U.S.C. § 1523 34
Section 403, 43 U.S.C. § 1543 49

Page

Section 601, 43 U.S.C. § 1551 31
Section 602, 43 U.S.C. § 1552 31
Section 604, 43 U.S.C. § 1554 .....32, 33
Section 605, 43 U.S.C. § 1555 .....32, 38
Colorado River Compact, H.R. Doc. No. 717, 80th Cong., 2d Sess. A19, A21 (1948) ...16, 21, 22, 30, 42, 43
Colorado River Storage Project Act
Section 4, 43 U.S.C. § 620c 30, 33
Section 5, 43 U.S.C. § 620d 29, 49
Federal Power Act
Section 3, 16 U.S.C. § 796 45
Section 4, 16 U.S.C. § 797 .....44, 46
Section 4(e), 16 U.S.C. § 797(e) 2, 3, 5, 11, 12, 13, 16, 19, 20, 21, 22, 34, 37, 38, 50, 56, 65, 75, 76
Section 10, 16 U.S.C. § 803 .....17, 46, 49, 50, 56
Section 12, 16 U.S.C. § 805 46
Section 13, 16 U.S.C. § 806 46
Section 14, 16 U.S.C. § 807 46
Section 17, 16 U.S.C. § 810 .....26, 49, 71
Section 18, 16 U.S.C. § 811 46
Section 21, 16 U.S.C. § 814 46
Section 23, 16 U.S.C. § 816 52
Section 24, 16 U.S.C. § 818 44
Section 313(b), 16 U.S.C. § 825*l*(b) 2, 11
Federal Water Pollution Control Act of 1972, 33 U.S.C. § 1251 40
National Environmental Policy Act, 42 U.S.C. § 4321 .. 40
Navajo-San Juan Chama Project Act
Section 11, 43 U.S.C. § 615ss 28, 36, 38
Section 13, 43 U.S.C. § 615uu 36
Section 14, 43 U.S.C. § 615vv 36
Reclamation Project Act of 1939
Section 9(c), 43 U.S.C. § 485h(c) 29, 33
28 U.S.C. § 1254(1) 2
Upper Colorado River Basin Compact of 1949, ch. 48, 63 Stat. 31 .....22, 30, 35
Act of August 11, 1888, ch. 860, 25 Stat. 400 .....57, 58
Act of Sept. 19, 1890, ch. 907, 27 Stat. 426 58
Act of June 13, 1902, ch. 1079, 32 Stat. 331, *as amended*, Act of June 28, 1902, ch. 1299, 32 Stat 408 58
Act of June 17, 1902, ch. 1093, 32 Stat. 388 32

Page

Act of March 6, 1906, ch. 517, 34 Stat. 52 58
Act of April 23, 1906, ch. 1660, 34 Stat. 130 58
Act of May 9, 1906, ch. 2438, 34 Stat. 183 58
Act of June 25, 1906, ch. 3530, 34 Stat. 456 58
Act of March 4, 1907, ch. 2912, 34 Stat. 1263 58
Act of March 3, 1909, ch. 264, 35 Stat. 815 58
Act of March 22, 1968, Pub.L. No. 90-272, 82 Stat. 52 .. 37
Act of Dec. 11, 1969, Pub.L. No. 91-144, 83 Stat. 323 .. 35
Act of July 6, 1970, Pub.L. No. 91-305, 83 Stat. 376 ... 35
Act of Oct. 7, 1970, Pub.L. No. 91-439, 84 Stat. 890 35
Act of Oct. 5, 1971, Pub.L. No. 92-134, 85 Stat. 365 35
Act of Oct. 25, 1972, Pub.L. No. 92-405, 86 Stat. 621 .. 35
Act of Oct. 16, 1973, Pub.L. No. 93-97, 87 Stat. 318 35
Federal Water Power Act of 1920, ch. 285, 41 Stat. 1063 .....17, 19, 25, 55, 56, 70, 71, 74, 75
Public Utility Act of 1935, ch. 687, 49 Stat. 803 47
Rivers and Harbors Act of 1917, ch. 49, 40 Stat. 250 .....70, 71, 72

CONGRESSIONAL MATERIALS:

BILLS:

H.R. 408, 64th Cong., 1st Sess. (1918) 62
H.R. 3184, 66th Cong., 1st Sess. (1919) 69
H.R. 5423, 74th Cong., 1st Sess. (1935) 47
H.R. 16053, 63d Cong., 2d Sess. (1914) 59, 60, 61, 63
H.R. 16673, 63d Cong., 2d Sess. (1914) 59
S. 1419, 65th Cong., 1st Sess. (1918) 62, 65
S. 1725, 74th Cong., 1st Sess. (1935) 47
S. 3331, 64th Cong., 1st Sess. (1916) 62, 63, 64, 65
S. 6413, 63d Cong., 3d Sess. (1914) 61

DEBATES:

49 CONG. REC. (1913) 57
51 CONG. REC. (1914) 56, 60, 61
53 CONG. REC. (1916) 56, 62, 64
56 CONG. REC. (1918) 56, 67, 73

Page

57 Cong. Rec. (1919) 69
58 Cong. Rec. (1919) 69, 73, 74
59 Cong. Rec. (1920) 56, 69, 74
69 Cong. Rec. (1928) 24
70 Cong. Rec. (1928) 22, 24
115 Cong. Rec. (1969) 35

Hearings:

Hearings on Boulder Dam (H.R. 9826) Before the House Comm. on Irrigation and Reclamation, 69th Cong., 2d Sess. (1927) 24, 25

Hearings on the Colorado River Basin (H.R. 6251 and H.R. 9826) Before the House Committee on Irrigation and Reclamation, 69th Cong., 1st Sess. (1926) 24, 25

Hearings on Interim Nuclear Licensing Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries, 92d Cong., 2d Sess. (1972) 54

Hearings on Power Plant Siting and Environmental Protection Before the Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce, 92d Cong., 1st Sess. (1971) 54

Hearings on the Problems of Electric Power Production in the Southwest Before the Senate Comm. on Interior and Insular Affairs, 92d Cong., 1st Sess. (1971) 9

Hearings on the Protection and Development of the Lower Colorado River Basin (H.R. 11449) Before the House Comm. on Irrigation of Arid Lands, 67th Cong., 2d Sess. (1922) 24

Hearings on the Protection and Development of the Lower Colorado River Basin (H.R. 2903) Before the House Comm. on Irrigation and Reclamation, 68th Cong., 1st Sess. (1924) 24

Page

Hearings on the Protection and Development of the Lower Colorado River Basin (H.R. 5773) Before the House Comm. on Irrigation and Reclamation, 70th Cong., 1st Sess. (1928) 23

Hearings on Public Utility Holding Company Act of 1935 Before the Senate Comm. on Interstate and Foreign Commerce, 74th Cong., 1st Sess. (1935) .. 48

Hearings on S. 1419 Before the House Comm. on Water Power, 65th Cong., 2d Sess. (1918) 56, 66, 67, 68

REPORTS AND DOCUMENTS:

H.R. REP. No. 61, 66th Cong., 1st Sess. (1919) 69
H.R. REP. No. 404, 64th Cong., 1st Sess. (1916) 63
H.R. REP. No. 715, 65th Cong., 2d Sess. (1918) 66, 67
H.R. REP. No. 842, 63d Cong., 2d Sess. (1914) 59
H.R. REP. No. 1147, 65th Cong., 3d Sess. (1919) 69
H.R. REP. No. 1312, 90th Cong., 2d Sess. (1968) ..22, 32, 34
S. DOC. No. 57, 62d Cong., 1st Sess. (1911) 57
S. REP. No. 89, 64th Cong., 1st Sess. (1916) 62
S. REP. No. 179, 65th Cong., 2d Sess. (1917) 65
S. REP. No. 621, 74th Cong., 1st Sess. (1935) 48
S. REP. No. 846, 63d Cong., 3d Sess. (1914) 61
S. REP. No. 92-1015, 92d Cong., 1st Sess. (1972) 9

MISCELLANEOUS:

DEPT. OF THE INTERIOR, FEDERAL RECLAMATION AND RELATED LAWS ANNOTATED (1972) 34

DEPT. OF THE INTERIOR, SOUTHWEST ENERGY STUDY, SUMMARY REPORT (1972) 9

FPC ANNUAL REPORT (1921) 53

FPC ANNUAL REPORT (1962) 54

FPC ANNUAL REPORT (1966) 54

1 FPC NATIONAL POWER SURVEY (1964) 54

35 Fed. Reg. 8951 (1970) 32

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BRIEF OF ARIZONA PUBLIC SERVICE COMPANY, ET AL.

OPINIONS BELOW

The opinion of the court below is that of the United States Court of Appeals for the District of Columbia Circuit in *Chemehuevi Tribe of Indians, et al.* v. *Federal Power Commission*, 489 F.2d 1207 (D.C. Cir. 1973), *rehearing denied* December 7, 1973, and Decem-

ber 19, 1973, on a petition of Chemehuevi Tribe of Indians, et al., for review of orders of the Federal Power Commission in Docket No. E-7664, dated November 4, 1971 (reported at 46 F.P.C. 1120), and December 10, 1971 (reported at 46 F.P.C. 1307).

GROUNDS ON WHICH JURISDICTION IS INVOKED

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the court of appeals was founded on Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*. Its judgment was entered November 9, 1973.

On June 10, 1974, the Supreme Court granted the petition for certiorari of these petitioners in *Arizona Public Service Co., et al.* v. *Chemehuevi Tribe, et al.*, No. 73-1666, the petition of the Federal Power Commission in *Federal Power Commission* v. *Chemehuevi Tribe, et al.*, No. 73-1667, and the cross-petition of the Chemehuevi Tribe, et al., in *Chemehuevi Tribe, et al.* v. *Federal Power Commission*, No. 73-1380, and ordered the three cases consolidated.

QUESTIONS PRESENTED FOR REVIEW

1. Whether a justiciable case or controversy is presented, and, in particular:

A. Whether legislation delegating to the Secretary of the Interior all federal authority with respect to the consumptive use of waters of the Colorado River System supplied from government dams has superseded Section 4(e) of the Federal Power Act with respect thereto, if that section was ever applicable to such uses, thereby rendering moot the court of appeals interpretation of Section 4(e) as requiring Federal Power Commission licenses for the use of such waters by the steam-electric generating plants involved in this case.

B. Whether the complainants lack standing to litigate the issue of whether the Secretary of the Interior or the Federal Power Commission has jurisdiction to license the consumptive use of water from government dams in the Colorado River Basin.

If, as we believe, no justiciable case or controversy is presented, this Court may properly reverse and vacate the judgment below as an advisory opinion, inasmuch as the question of construction of Section 4(e) need not have been reached.

Otherwise the issues encompass:

2. The question presented by the petition for a writ of certiorari of the Chemehuevi Tribe of Indians, et al., in No. 73-1380:

"Whether the court below properly construed the term 'project works' in Section 4(e) of the Federal Power Act, 16 U.S.C. § 797(e), to be limited to hydroelectric plants, thereby excluding fossil-fueled thermal-electric plants from the licensing authority of the Federal Power Commission."

We would answer this in the affirmative.

3. The question presented in our petition in No. 73-1666:

"Whether Section 4(e) of the Federal Power Act (16 U.S.C. Sec. 797(e)), which authorizes the Federal Power Commission to issue a license 'for the purpose [*inter alia*] of utilizing the surplus water or water power from any Government dam,' requires that a license be obtained for the use of water by thermal electric generating plants solely for boiler and cooling purposes, as contrasted with the use of water or water power for hydroelectric power generation."

We would answer this in the negative, as the Solicitor General answered a similar question in his petition.

As all of these are issues of law, remand to the Commission for further determinations, ordered by the court of appeals, is not warranted.

PROVISIONS OF STATUTES AND INTERSTATE COMPACTS

Relevant extracts from the statutes and compacts involved are printed as Attachment A to this brief. They are:

Sections 4(e), 10(e) and 23 of the Federal Power Act, 16 U.S.C. §§ 797(e), 803(e), 817.

Sections 5 and 6 of the Boulder Canyon Project Act, 43 U.S.C. § 617d, e.

Section 9(c) of the Reclamation Project Act of 1939, 43 U.S.C. § 485h(c).

Section 4 of the Colorado River Storage Project Act, 43 U.S.C. § 620c.

Sections 11(a), (b), 13(a), (b), 14 of the Navajo-San Juan Chama Project Act, 43 U.S.C. §§ 615ss (a), (b), 615uu(a), (b), 615vv.

Act of March 22, 1968, Pub.L. 90-272; 82 Stat. 52; U.S. Code Cong. & Admin. News at 63 (1968).

Sections 301(b), (c), and 303(a), (b), (c), (d) of the Colorado River Basin Project Act, 43 U.S.C. §§ 1521 (b), (c), 1523(a),(b),(c),(d).

Articles III(a), (d), (e), and VIII of the Colorado River Compact, H.R.Doc. 717, 80th Cong., 2d Sess. A19, A21 (1948).

Article III(a) of the Upper Colorado River Basin Compact, H.R. Doc. 717, 80th Cong., 2d Sess. A169 (1948).

STATEMENT OF THE CASE

1. Summary

The Chemehuevi and Cocopah Tribes of Indians, alleging ownership of water rights in the Colorado River, joined by others who did not assert such ownership, filed a complaint with the Federal Power Commission, asking that the Commission exercise licensing jurisdiction under Section 4(e) of the Federal Power Act over six steam-electric generating plants, in four States, which utilize waters of the Colorado River System in their boilers and for cooling purposes. The complaint alleged that these plants are "project works" along navigable waters, that they also utilize "surplus" waters from government dams, and that Section 4(e) of the Act confers licensing jurisdiction over steam-electric generating plants in such circumstances. The Commission, sua sponte, dismissed the complaint for lack of jurisdiction over steam plants, holding (as it had for more than a half-century) that its jurisdiction under Part I of the Act is limited to hydroelectric projects. The court of appeals, while agreeing with the Commission that Section 4(e) of the Act does not extend the Commission's licensing jurisdiction to steam-electric generating plants as "project works" in consequence of their use of waters of a navigable stream, nevertheless held that this section does confer licensing jurisdiction on the Commission with respect to utilization by steam plants of "surplus water . . . from any Government dam" for such purposes. It remanded the case to the Commission to determine whether the water used in the six steam-electric generating plants involved here is "surplus water," and whether any jurisdiction that the Commission might have is affected in any way by the jurisdiction of any other federal agency. It did not define the term "surplus water."

The uses of water (that the court of appeals said may be "surplus water . . . from any Government dam") made by these plants in boilers and cooling systems are "consumptive uses," that is, the quantity returned to the stream is less than the quantity diverted.[1] The consumptive use of water is to be distinguished from non-consumptive uses, *e.g.*, in the generation of hydroelectric power.

These six thermal plants consume waters of the Colorado River System in conformity with the "Law of the River," *i.e.*, the apportionments of consumptive use made in the Colorado River Compact, the Upper Colorado River Basin Compact, the Mexican Water Treaty, the decree of this Court in *Arizona* v. *California, et al.*, 376 U.S. 340 (1964), and several federal statutes, discussed in Part I of this brief, which delegate to the Secretary of the Interior, exclusively, all federal authority with respect to the consumptive use of all water stored by government dams in the Colorado River Basin. The plants which use water supplied from government dams do so pursuant to contracts with the Secretary made under the authority of those statutes.

Although the court below referred to the six power plants collectively as "the Four Corners plants," the distance between the Mohave Plant and the Four Corners Plant, 375 miles, is about equal to the distance between Washington and Toronto. A map, Item 4 of the separately printed Supplement to this brief, illustrates the large distances involved.

In more detail:

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[1] Arizona v. California, 373 U.S. 546, 557, n. 23 (1963). The quantity thus "permanently withdrawn" is quoted by the court of appeals (App. 52) from our adversaries' brief in the court of appeals as aggregating 250,000 acre-feet annually.

2. The complaint filed with the Federal Power Commission

On September 10, 1971, the Chemehuevi Tribe of Indians, et al.[2] (Complainants), filed with the Federal Power Commission a Complaint, Petition for Order to Show Cause and Request for Expedited Procedure, against Arizona Public Service Company, et al.,[3] asking the Commission to assert licensing jurisdiction under Part I of the Federal Power Act[4] over six planned or existing steam-electric generating plants in the Southwest which consume waters of the Colorado River System in their boilers and for cooling purposes[5] (App. 1).

3. The Power Plants Involved

Water for consumption in boilers and cooling systems is supplied to the Mohave Plant, in southeastern Nevada, from Hoover Dam; to the Navajo Plant, in

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[2] The Cocopah Tribe of Indians, the Sierra Club, Committee to Save Black Mesa, Emma Yazzie, Jimmie Yazzie, Paul Begay, Chester Hugh Benally, and Ben Begay.

[3] Ten "complainees" were named: Arizona Public Service Company, Southern California Edison Company, Salt River Project Agricultural Improvement and Power District, Tucson Gas & Electric Company, El Paso Electric Company, Nevada Power Company, Utah Power & Light Company, Department of Water and Power of the City of Los Angeles, San Diego Gas & Electric Company, Public Service Company of New Mexico.

[4] 16 U.S.C. §§ 792-823. Part I, captioned "Regulation of the Development of Water Power and Resources," was enacted in 1920 as the Federal Water Power Act.

[5] The power plants are identified at pp. 7-9, *infra*, and, with the federal contracts involved, are described in Item 2 of the Supplement to this brief, which reproduces the findings of fact in Jicarilla Apache Tribe of Indians, et al. v. Morton, et al., 3 ERC 1919 (D. Ariz. 1972), *aff'd*, 471 F.2d 1275 (9th Cir. 1973), a case in which all of the complainants (respondents) except the Chemehuevi and Cocopah Tribes were parties. See also Yazzie, et al. v. Morton, et al., 59 F.R.D. 377 (1973). Plant ownerships, as among the petitioners, are tabulated in Item 3 of the Supplement. Item 4 is a location map.

northern Arizona, and the (proposed) Kaiparowits Plant in southern Utah, from Lake Powell, the reservoir created by Glen Canyon Dam; to the Huntington Plant, in Utah, from a Reclamation reservoir on a tributary of the Colorado River; to the San Juan Plant, in northwestern New Mexico, from the Navajo Dam; to the Four Corners Plant, in northwestern New Mexico, from the San Juan River.

Each plant which uses water supplied from a government dam does so pursuant to a contract with the Secretary of the Interior,[6] made under statutes which specify that no water stored by such a dam may be used except by contract with the Secretary. Five of the six plants are in this category, although one of them, Huntington, also uses water appropriated under the laws of Utah from the natural unregulated flow of certain streams. The sixth plant, Four Corners, uses water under appropriations from the natural unregulated flow of the San Juan River made under the laws of New Mexico prior to the authorization of any government dam on that stream.[7]

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[6] Certified copies of water contracts have been filed with the Court.

[7] The findings of fact in *Jicarilla*, Supp. at 94s-128s, state, with reference to the Four Corners Plant:

> ". . . Water for use of Units 1-5 (about 51,600 acre-feet annually) is obtained from the San Juan River under diversion rights granted by the New Mexico State Engineer in 1955. A water service contract approved by Congress was executed by the Secretary of the Interior in April 1968 with Utah Mining and Construction Company for 44,000 acre-feet of water from the Navajo Reservoir, a Bureau of Reclamation facility, for possible future development of coal resources."

Counsel are advised, however, that no use of water by the Four Corners Plant or any other power plant has been made under that contract.

The six power plants are expected to supply 22% of the power requirements of consumers in the States of Arizona, California, Nevada, Utah, New Mexico, and Texas, in 1980.[8]

The locations of the plants are shown on the map, Item 4 of the Supplement to this brief. They are described in general terms in the court of appeals opinion (App. 41-43), and in greater detail in the findings of fact in *Jicarilla Apache Tribe of Indians, et al.* v. *Morton, et al.*, 3 ERC 1919 (D. Ariz. 1972), *aff'd*, 471 F.2d 1275 (9th Cir. 1973), reproduced as Item 2 of the Supplement to this brief.[9] Their ownerships are tabulated in the Supplement, Item 3.

All of the power plants are also the subject of contracts between their owners and the Secretary of the Interior involving one or more of the following: use of federal land, Indian land, federal ownership participation (in one plant, Navajo), coal rights, easements, and rights-of-way.[10] The extensive federal involvement with each of these plants, including the Secre-

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[8] *Problems of Electrical Power Production in the Southwest*, S. REP. No. 92-1015, 92d Cong., 1st Sess. at 48 (1972).

[9] The plants were the subject of congressional oversight hearings, *Problems of Electric Power Production in the Southwest, Hearings Before the Senate Comm. on Interior and Insular Affairs*, Parts 1-7, 92d Cong., 1st Sess. (1971), a Senate report, S. REP. No. 92-1015, 92d Cong., 1st Sess. (1972), and the DEPARTMENT OF THE INTERIOR, SOUTHWEST ENERGY STUDY, SUMMARY REPORT (1972).

[10] A summary of these contracts, as of 1972, can be found in S. REP. No. 92-1015, 92d Cong., 1st Sess., at pp. 102-110 (1972). Another listing can be found in *Problems of Electrical Power Production in the Southwest, Hearings before the Senate Comm. on Interior and Insular Affairs*, 92d Cong., 1st Sess., Part 6, at 1961-70 (1971).

tary's authority with respect to pollution control, is set forth in the findings of fact in the *Jicarilla* case. (Supplement, Item 2).

4. The Complainants

The complainants are:

(1) The Chemehuevi Tribe of Indians, whose reservation is in California, some 110 miles below Hoover Dam, 40 miles from the nearest power plant, Mohave, 385 miles from the most distant, Huntington, 365 miles from Four Corners. Its water rights were decreed in *Arizona* v. *California, et al.*, 376 U.S. 340 (1964).

(2) The Cocopah Tribe of Indians, residing south of Yuma, Arizona, 235 miles below Hoover Dam, 175 miles from the nearest plant, Mohave, 510 miles from Huntington, 455 miles from Four Corners. Its water rights were also decreed in *Arizona* v. *California*.

(3) The Sierra Club.

(4) The Committee to Save Black Mesa (a source of coal supplied to certain of these plants under contracts made by the Navajo Tribal Council).

(5) Five individuals, members of the Navajo Tribe.

5. The Commission's Order

The Commission, sua sponte, entered an order November 7, 1971 (App. 22), dismissing the complaint for lack of jurisdiction over steam-electric generating plants, citing *FPC* v. *Union Electric Co.*, 381 U.S. 90 (1965). It denied a petition for rehearing December 10, 1971 (App. 28).

6. Opinion of the Court of Appeals

The complainants petitioned the Court of Appeals for the District of Columbia Circuit to review the Commission's orders, under Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b).

On November 9, 1973, the court handed down its opinion (App. 38). The court identified two issues (App. 53):

> "Petitioners contend that FPC jurisdiction is properly invoked under § 4(e) of the Federal Power Act for two reasons: either because the six plants identified in the complaint are 'project works' necessary for the development of power along navigable waters or because the plants will utilize 'surplus water' from Government dams."

As to the first ground, the court held that the six plants are not "project works" necessary for the development of power along navigable waters, and accordingly that the "navigable waters" clause of Section 4(e) did not confer licensing authority on the Commission. The court said, *inter alia* (App. 72):

> "The history of the Act shows beyond any doubt that the only segment of the power industry that was intended to be regulated by the Act was the construction and operation of facilities for the generation of hydroelectric power."

Again (App. 90):

> ". . . Steam plants were purposely omitted from the congressional scheme, and we cannot rewrite the statute to correct what may have been legislative shortsightedness."

It might be thought that these conclusions disposed of the entire case.

Not so. Turning to the "surplus water" language of Section 4(e), the court said (App. 97-98):

> "Petitioners contend that two of the Four Corners plants—Navajo and Kaiparowitz [*sic*]—will withdraw water directly from impoundments created by a Government dam, and that the other four plants are downstream from Government dams and will have water available on a dependable basis only because of the 'stream regimen imposed by upstream government dams'. [Footnote omitted.] According to petitioners, these are usages of 'surplus water' that invoke Commission jurisdiction under § 4(e) and require the Commission to regulate the operations of the Four Corners plants. We agree that § 4(e) empowers the FPC to license the use of surplus water by steam plants, and accordingly we remand to the Commission for consideration of petitioners' 'surplus water' claim."

After citing pre-Federal Water Power Act cases involving hydroelectric projects using water diverted from reservoirs created by government dams, the court said (App. 112):

> "... We hold only that *the Commission does have jurisdiction to license the utilization of surplus water*[11] *by thermal-electric generating plants,* and we leave to the Commission to determine in the first instance whether the plants involved in this appeal fall within the category asserted by peti-

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[11] (Our footnote). For examples of the licensing of surplus water for use by hydroelectric power plants, see Green Mountain Power Corp., 13 F.P.C. 1211 (1954) (power plant constructed at government dam); Utah Power & Light Company, 31 F.P.C. 958 (1964) (water diverted by canal from reservoir to private property); Alabama Power Company, 34 F.P.C. 1108 (1965) (power plant constructed at government dam).

> tioners. In determining this question, the Commission should also consider whether any jurisdiction it might have under the Federal Power Act is affected in any way by the jurisdiction of any other federal agency." (Emphasis added; footnote omitted.)

The sentence last quoted reflects the court's awareness, stated earlier in the opinion (App. 94) that:

> ". . . there may be federal legislation peculiarly applicable to the operations of particular power plants, such as the extensive regulation of withdrawals of water from the Colorado River system." [12]

SUMMARY OF ARGUMENT

I.

Although we would welcome a decision on the merits, we feel constrained to place before the Court the considerations which, in our view, lead to the conclusion that the judgment below should be reversed and vacated for lack of a justiciable controversy, inasmuch as (A) legislation subsequent to the Federal Power Act has made Section 4(e), whatever its meaning, inapplicable to the consumptive use of waters of the Colorado River System, and (B) all of the complainants lack standing to litigate the issue which is here for decision, *i.e.*, jurisdiction as between the Secretary of the Interior and the Federal Power Commission.

A.

The decision below, construing Section 4(e) in relation to these six steam plants, was an advisory opinion, not applicable to the case before it.

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[12] See note 14, *infra*, for examples cited by the court.

Congress has delegated to the Secretary of the Interior, to the exclusion of the Federal Power Commission, all federal authority relating to the consumptive use of waters stored by government dams in the Colorado River Basin, impressing thereon the "Law of the River," a complex of compacts, treaty, federal statutes, and court decisions. Use of water in steam-electric generating plants is a consumptive use which, by specific statutory direction, can be supplied from government dams in the Colorado River Basin only pursuant to contract with the Secretary of the Interior, as contrasted with the non-consumptive use of the kinetic energy in falling water by means of hydroelectric projects, left subject to license by the Commission. Thus Congress, by statutes subsequent to the Federal Power Act, has restricted the licensing functions of the Federal Power Commission in the Colorado River Basin to hydroelectric power projects, whatever may be the Commission's functions in other parts of the country. All of the power plants involved here which use water from government dams are supplied that water by the Secretary under his contracts, in obedience to statute. The court of appeals, instead of remanding the case to the Commission to determine whether Congress had delegated authority to dispose of surplus water from government dams in the Colorado River Basin to agencies other than the Federal Power Commission, should have determined, itself, as a matter of law, that Congress has made that delegation to the Secretary of the Interior, and so should have affirmed the Commission's order dismissing the complaint for lack of jurisdiction.

B.

Injury is an essential element of "standing." That element is lacking here.

The only issue requiring decision in the suit brought by these complainants is whether the Secretary of the Interior or the Federal Power Commission shall license the consumptive use of water stored by government dams. No complainant will be affected one way or the other by that decision. The environmental concerns which they voice are not here for resolution. As both the Commission and the Secretary are subject to the same statutory controls relating to protection of the environment, the complainants would have exactly the same remedies, irrespective of whether the Secretary or the Commission should sign the document authorizing the consumptive use of water from these Colorado River dams.

The complainants other than the Chemehuevi and Cocopah Tribes have all been plaintiffs in other unsuccessful suits against these plants, raising environmental issues. Apparently the two tribes have been joined on this occasion because they own water rights in the Colorado River, alone among all the complainants.

But injury to these tribes in their capacity as water users is precluded by the "Law of the River." The decision and decree of this Court in *Arizona* v. *California, et al.*, awarded these tribes "present perfected rights" of such high priority as to protect them totally against shortages occasioned by any other users. Federal legislation implementing that decree made certain that all shortages must be borne by others. Moreover, the de-

cree precludes any complaint by these tribes against consumptive use by the Mohave Plant in Nevada, inasmuch as its use is within the apportionment made by the decree to Nevada. The Colorado River Compact precludes their complaint against consumptive use of water by any of the five plants in the Upper Basin. As no use of water by any of the six plants can cause injury to these tribes, their complaint that such use may cause shortages is moot. Beyond this, the Commission has no jurisdiction to adjudicate water rights either as to quantity or quality of water. Indeed, Article II of the decree in *Arizona* v. *California* enjoins the United States, its officers, attorneys and employees (including, of course, the Federal Power Commission as well as the Secretary) from operating structures or releasing waters otherwise than in accordance with the decree.

If the Court, nevertheless, concludes that it was necessary for the court of appeals to decide the questions of whether Section 4(e) of the Federal Power Act confers licensing jurisdiction on the Federal Power Commission (i) over thermal electric plants as "project works" along navigable waters, or (ii) over the consumptive use by thermal electric plants of waters stored by government dams, then the decision below should be affirmed with respect to the first point, and reversed with respect to the second, for the following reasons:

II.

The rationale of the court's proper conclusion, that the licensing jurisdiction of the Commission over "project works" does not extend to steam plants which use the waters of a navigable stream in their boilers

and cooling apparatus, logically requires the conclusion that its licensing jurisdiction does not encompass the consumptive use of "surplus water . . . from any Government dam" by the same kind of plant from the same stream for these same purposes.

The text of the Act, the 1935 amendments, legislative history, the rationale of this Court's opinion in *FPC* v. *Union Electric Co.*, and 54 years of administrative construction, all require the same conclusion in the one case as in the other.

A.

The language of the Act is wholly devoted to the terminology and problems associated with hydroelectric power. It is totally lacking in criteria and detail which would be necessary to give the Commission guidance if it were expected to license steam power plants, which are never mentioned. Steam-electric power generation cannot be made to fit a statute minutely designed to enhance and regulate the development of another source of energy: the Federal *Water Power* Act, as its authors appropriately named it.

B.

In 1935 Congress made two significant decisions in amending the Federal Water Power Act.

It rejected an amendment which would have given the Commission "certification" authority over electrical production facilities other than hydroelectric projects, *e.g.*, steam-electric generating plants.

At the same time, Congress amended Section 10(f) to provide that where a "project not under license" is benefited by construction by the United States (or an-

other) of a "headwater improvement," the Commission is authorized to require an equitable annual charge to be paid on account of such benefits received by the "unlicensed project." This negates the court's assumption that the use of water in a reach of a stream where the regimen is affected by an upstream government dam is, by hypothesis, use of surplus water from that dam, subjecting the user to the requirement of a license. If the court were right, there could not be an "unlicensed project" in these circumstances.

C.

This Court's interpretation of the Federal Power Act in *FPC* v. *Union Electric Co.* (the *Taum Sauk* case), consistently with earlier cases, has limited the Commission's licensing jurisdiction to the utilization of the power potential in water.

D.

The administrative construction for 54 years has consistently restricted the Commission's licensing jurisdiction to hydroelectric projects, and is entitled to great weight. Congress, with such views before it, has several times amended the Federal Power Act without expressing dissatisfaction with that construction. The Commission, in so advising Congress, has never suggested that its disclaimer applied only to steam plants using navigable waters, whereas steam plants using surplus water from government dams were within its licensing jurisdiction. Instead, it proposed (but without success) legislation that would for the first time (as it said) give it licensing jurisdiction over steam plants.

III.

The legislative history of Section 4(e) of the Federal Power Act is reviewed in detail in Item 1 of the Supplement to this brief, separately bound. This shows unmistakably that the "surplus water" clause, like the "project works" clause, was intended to apply only to hydroelectric projects. The references to steam power were in the context of an unlicensed competitor with hydroelectric projects. No consumptive uses, *e.g.*, irrigation and industrial uses, were to be regulated by the Commission.

The court's assumption that the Waterways Commission which Congress authorized in 1916 was intended to have jurisdiction of some sort with reference to steam plants, and that the repeal of that authorization which was effected by the Federal Power Act was intended to transfer such jurisdiction to the Commission, is refuted by the legislative history of both acts. The Waterways Commission was solely an investigatory agency, with no licensing powers. Steam plants were not even in the statutory inventory of subjects it was to investigate. But, whatever the intended scope of the Waterways Commission's inquiries may have been, the Senate, in approving the Federal Water Power Act, rejected a proposed amendment which would have transferred all the functions of the defunct Commission to the new one. Clearly, the demise of the Waterways Commission did not kindle an implied jurisdiction in the Federal Power Commission that the Federal Water Power Act failed to state and that its legislative history does not suggest.

ARGUMENT

I.

THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE REVERSED AND VACATED FOR LACK OF A JUSTICIABLE CONTROVERSY.

A. The elements of justiciability

The Court, in *Gilligan* v. *Morgan*, 413 U.S. 1, 9-10 (1973), citing *Flast* v. *Cohen*, 392 U.S. 83, 95 (1968), noted particularly three criteria of justiciability:

> "In determining justiciability, the analysis in Flast thus suggests that there is no justiciable controversy (a) when the parties are asking for an advisory opinion, (b) 'when the question sought to be adjudicated has been mooted by subsequent developments,' and (c) 'when there is no standing to maintain the action.' As we noted in Poe v Ullman, 367 U.S. 497 (1961), and repeated in Flast, '[j]usticiability is . . . not a legal concept with a fixed content or susceptible of scientific verification. Its utilization is the resultant of many subtle pressures . . . .'"

By all three of these tests, the case presented by respondents (complainants) fails to present a justiciable case or controversy. They do indeed ask for an opinion that can only be advisory with respect to the meaning of the surplus water clause of Section 4(e), because "subsequent developments," *i.e.*, subsequent acts of Congress, have made that provision inapplicable to the consumptive use of water from government dams in the Colorado River Basin, whatever the scope of that section may be elsewhere. Moreover, all of the complainants lack standing, because none of them alleges an interest which would be affected by the resolution of the question of whether the Secretary of the Interior or the Federal Power Commission has

jurisdiction to control the use of water supplied to steam plants from government dams in the Colorado River Basin. That is the question here for decision.

B. Section 4(e) of the Federal Power Act has no application to the consumptive use of waters of the Colorado River System, having been superseded by legislation which delegates exclusively to the Secretary of the Interior all federal authority relating to the consumptive use of such waters from government dams. He has exercised that authority by his contracts.

1. *The significance of the "Law of the River."*

The Court has before it the question of whether licenses under Section 4(e) of the Federal Power Act are required for six specific steam-electric generating plants which use waters of the Colorado River System. Their use of water is a consumptive use,[13] in boilers and cooling apparatus, as distinguished from the non-consumptive use of the kinetic energy of falling water in hydroelectric generating plants. The decree in *Arizona* v. *California*, 376 U.S. 340 (1964), defined "domestic use" to "include the use of water for household, stock, municipal, mining, milling, industrial, and other like purposes, but shall exclude the generation of electrical power," *i.e.*, hydroelectric power. *Id.* at 341 (Article I(I)). This paraphrases Article II(h) of the Colorado River Compact. The use of water by steam plants is an industrial use.

The consumptive use of waters of the Colorado River System is controlled by the "Law of the River," a complex of federal statutes, opinions and a decree of this Court, interstate compacts, the Mexican Water Treaty, and contracts executed by the Secretary which are subject to all of the foregoing.

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[13] Diversions less returns to the river, Arizona v. California, decree, 376 U.S. 340 (1964) (Art. I(A)); opinion, 373 U.S. 546, 557 n. 23 (1963).

The court below conceded (App. 94) that:

> ". . . there may be federal legislation peculiarly applicable to the operations of particular power plants, such as the extensive regulation of withdrawals of water from the Colorado River system." [14]

The court, in our view, should have proceeded to examine the cited statutes, and to determine that they vest exclusive jurisdiction in the Secretary of the Interior to control all consumptive uses of water supplied from government dams, precluding the licensing jurisdiction of the Federal Power Act with respect to consumptive use of waters of the Colorado River System, whatever its jurisdiction may be with respect to steam plants in other basins. It erred, we submit, in proceeding to the interpretation of Section 4(e) with respect to steam plants generally, in a case to which Section 4(e) is not applicable. Its opinion is, therefore, an advisory one.

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[14] The footnote to the quoted sentence (App. 94, n. 135) identifies a number of the elements of the Law of the River:

> "[135] The Colorado River is apportioned between the Upper and Lower Basin states by the Colorado River Compact, *see* 70 Cong. Rec. 324 (1928), and among the states within the basin by the Upper Basin Compact, 63 Stat. 31 (1949), and the Boulder Canyon Project Act, 43 U.S.C. §§ 617-17u (1970). *See* Arizona v. California, 373 U.S. 546 (1963). In times of shortage, the Secretary of the Interior has authority to allocate the waters among the states and among the users of each state, *See* Arizona v. California, *supra*, 373 U.S. at 579-90. Other federal controls over the flow of the river are provided by the Mexican Water Treaty, T.S. 994, 59 Stat. 1219; the Colorado River Storage Project Act, 43 U.S.C. §§ 620-620o (1970); and the Colorado River Basin Project Act, 43 U.S.C. §§ 1501-56 (1970). For a history and discussion of the Colorado River legislation, see H.R. Rep. No. 1312, 90th Cong., 2d Sess. (1968), in 3 U.S. Code Cong. & Ad. News 3666 (1968)."

2. *The Boulder Canyon Project Act,* 43 U.S.C. § 617 et seq.

The statutory pattern of the Law of the River was set by the Boulder Canyon Project Act, 43 U.S.C. § 617 et seq. This statute explicitly vests exclusive authority in the Secretary, not the Federal Power Commission, to control the use of water stored by Hoover Dam not only at the dam, but at all points between the dam and the Mexican border.

Section 5 of the Boulder Canyon Project Act, 43 U.S.C. § 617d, provides in part:

> "Sec. 5. That the Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon . . . . Contracts respecting water for irrigation and domestic uses shall be for permanent service and shall conform to paragraph (a) of section 4 of this Act. *No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.*" (Emphasis added.)

The congressional decision to vest plenary authority in the Secretary, not the Commission, was deliberate. This act ended a contest which had persisted through four Congresses over the development of the water resources of the Lower Colorado River Basin.[15] Power

[15] Bills for construction of the Boulder Canyon Project were introduced in four consecutive Congresses by Congressman Swing and Senator Johnson beginning in 1922. A chronology of this and earlier congressional consideration of the Project is found in *Hearings on the Protection and Development of the Lower Colorado River Basin (H.R. 5773) Before the House Committee on Irrigation and Reclamation*, 70th Cong., 1st Sess., pt. 1, at 8-10 (1928) (statement by Committee Chairman Smith).

development was a major issue. There were members of Congress who believed that private interests should be licensed under the Federal Water Power Act to construct a dam and power plant in Boulder or Black Canyon.[16] Others insisted that the federal government should do so.[17] The latter prevailed.[18] A compromise

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[16] *E.g.*, the discussion of private applications for development of the site in *Hearings on the Protection and Development of the Lower Colorado River Basin (H.R. 11449) Before the House Committee on Irrigation of Arid Lands*, 67th Cong., 2d Sess. 128, 170, 187 (1922), and in *Hearings on the Protection and Development of the Lower Colorado River Basin (H.R. 2903) Before the House Committee on Irrigation and Reclamation*, 68th Cong., 1st Sess. 480, 523 (1924). In a letter dated March 24, 1924, the three members of the Federal Power Commission recommended to the House committee that the Commission should be entrusted with the supervision of the water power aspects of the project. *Id.* at 1002. By the time of final floor debate in 1928, the issue of federal construction of the dam had been resolved, but disagreement continued on whether the power works at the dam site should be federally built or privately built under FPC or Interior license. Senator Hayden offered a floor amendment to make the FPC the licensing authority. 69 CONG. REC. 10275 (1928). His amendment was discussed and offered but never voted upon. *Id.*; 70 CONG. REC. 80 (1928).

[17] *E.g.*, *Hearings on the Lower Colorado River Basin (H.R. 2903) Before the House Committee on Irrigation and Reclamation*, 68th Cong., 1st Sess. 1778-80 (1924) (statement by Congressman Swing). Congressman Davenport offered a floor amendment to insure that the federal government would build the power plant, 69 CONG. REC. 9976-78 (1928), and although the amendment was accepted by the House, it was not part of the Senate substitute bill, 70 CONG. REC. 600 (1928), and was not insisted upon by the House. *Id.* at 831-32.

[18] *Hearings on Boulder Dam (H.R. 9826) Before the House Committee on Rules*, 69th Cong., 2d Sess. 111 (1927) (testimony of Congressman Swing); *Hearings on the Colorado River Basin (H.R. 6251 and H.R. 9826) Before the House Committee on Irrigation and Reclamation*, 69th Cong., 1st Sess. 32 (1926) (testimony of Senator Hayden).

proposal that the government build the dam, but license the use of the water power there under the surplus water clause of Section 4(e) of the Federal Water Power Act, was offered by Congressman Leatherwood in the House committee:[19]

> "The Secretary of the Interior is hereby authorized to permit the use of surplus waters, not required for irrigation or domestic uses, by any political subdivisions, or municipal or private corporations, who shall become licensees for the purpose under the Federal water power act, approved June 10, 1920, as provided therein for the use of surplus water at Government dams. The Federal Power Commission is hereby authorized to issue preliminary permits and licenses for the purpose of utilizing the surplus water or water power from said dam . . . ."

The amendment was discussed later by the Irrigation and Reclamation Committee in closed session, where it received only three votes and was defeated.[20] Instead, the Secretary of the Interior was authorized to construct the dam, and, at his option, to construct the power plant and lease it out, or operate it and sell energy therefrom, or to lease out falling water to an entity which might construct the plant. Section 6 of Boulder Canyon Project Act, 43 U.S.C. § 617e.

The Boulder Canyon Project Act contains numerous references to the Federal Power Act, but only for the purpose of assimilating provisions or policies of the

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[19] *Hearings on the Colorado River Basin (H.R. 6251 and H.R. 9826) Before the House Committee on Irrigation and Reclamation*, 69th Cong., 1st Sess. 244-48 (1926).

[20] *Hearings on Boulder Dam (H.R. 9826) Before the House Committee on Rules*, 69th Cong., 2d Sess. 38-40 (1927).

Federal Power Act in the authority delegated to the Secretary, not for the purpose of subordinating his contracts to the jurisdiction of the Commission. *E.g.*, Secs. 5(e), 13(e), 43 U.S.C. §§ 617d(e), 617*l*(e).

Amendments made by the Boulder Canyon Project Adjustment Act in 1940, 43 U.S.C. § 618, directed that revenues be deposited in designated funds, for specific purposes.[21]

This Court, in *Arizona v. California*, 373 U.S. 546, 579-80 (1963), said:

> "Having undertaken this beneficial project, Congress, in several provisions of the Act, made it clear that no one should use mainstream waters save in strict compliance with the scheme set up by the Act. Section 5 authorized the Secretary 'under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river . . . as may be agreed upon, for irrigation and domestic uses . . . .' To emphasize that water could be obtained from the Secretary alone, § 5 further declared, 'No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.'
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[21] As will be noted, each of the later Colorado River statutes directs that revenues from disposition of stored water and power accruing to the United States be deposited in special funds related to development of the water resources of the Colorado River Basin. This is in contrast with Section 17 of the Federal Power Act, 16 U.S.C. § 810, which, as amended in 1935, requires that revenues (including those from "surplus water") be allocated to specified funds quite different from those named in the Colorado River legislation.

> "These several provisions, even without legislative history, are persuasive that Congress intended the Secretary of the Interior, through his § 5 contracts, both to carry out the allocation of the waters of the main Colorado River among the Lower Basin States *and to decide which users within each State would get water.*" (Emphasis added.)

In an earlier *Arizona v. California* case, 298 U.S. 558, 570 (1936), the Court had spoken in the same vein:

> ". . . the United States, by congressional legislation and by acts of its officers which that legislation authorizes, has undertaken, in the asserted exercise of its authority to control navigation, *to impound, and control the disposition of the surplus water in the river not already appropriated.*" (Emphasis added.)

Section 5 of the Project Act is dispositive of the case as to the Mohave Plant. This plant, located downstream from Hoover Dam, uses water pursuant to a contract made under Section 5 of the Project Act. After this Court's decision and decree in *Arizona v. California,* awarding Nevada the consumptive use of 300,000 acre-feet annually and requiring contracts of individual water users with the Secretary, he made his contractual arrangements in two phases, simultaneously, for the supply of water for the Mohave Plant. On October 26, 1966, he contracted with the State of Nevada to deliver from storage in Lake Mead up to 30,000 acre-feet annually for use in this plant for a period of 35 years, the United States to construct the necessary diversion works (Supplement at 101s), and on the same date approved a companion contract between the State and the owners of the plant whereby the State redelivered the same quantities to the plant,

at a slightly higher price. Both contracts contain detailed environmental provisions. (*Id.* at 102s.)

While the Mohave Plant is the only one of the six which receives water under the terms of the Boulder Canyon Project Act, the policy set by that act, of exclusive delegation to the Secretary of all federal authority with respect to consumptive uses of water supplied from government dams, has been followed in the later acts which relate to the use of water by the Upper Basin plants, as we shall see.

3. *The Upper Basin Reservoirs and the steam plants served by them under contracts with the Secretary*

The plants other than Mohave are all in the Upper Basin of the Colorado River. Three storage reservoirs are involved:

(1) Lake Powell, created by Glen Canyon Dam on the main stream, constructed under the authority of the Colorado River Storage Project Act, 43 U.S.C. § 620, et seq., from which water is supplied to the Navajo Plant and will be supplied to the planned Kaiparowits Plant.

(2) Navajo Reservoir, on the San Juan River[22] in New Mexico, which supplies water to the San Juan Plant. The Navajo Dam and reservoir are "participating projects" named in the Colorado River Storage Project Act, *supra,* and, in addition, use of water from that reservoir is controlled by the Navajo-San Juan Chama Project Act, 43 U.S.C. § 615ss(a), (b), which not only requires a contract with the Secretary, but also requires that long-term contracts be approved by special acts of Congress.

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[22] The Four Corners Plant, on the San Juan, uses water pursuant to appropriations of natural flow under the laws of New Mexico.

(3) Joe's Valley Reservoir on Seely Creek, a tributary of the Colorado River in central Utah. The reservoir is a part of the Emery County Project authorized by the Colorado River Storage Project Act. Emery County Project water is available for use at the Huntington Plant pursuant to contract among the Emery Water Conservancy District, United States of America, and Utah Power & Light Company.

Three statutes controlling the use of water from government dams are of general application to reservoirs in the Upper Basin. These are (1) the Colorado River Storage Project Act, 43 U.S.C. § 620, et seq., (2) Section 9(c) of the Reclamation Project Act of 1939, 43 U.S.C. § 485h(c), and (3) certain provisions of the Colorado River Basin Project Act of 1968, 43 U.S.C. § 1501, et seq.

4. *The Colorado River Storage Project Act,* 43 U.S.C. § 620, et seq.

This act authorized the Secretary of the Interior to construct and operate four major dams, with power plants, *i.e.,* Glen Canyon, on the mainstream, Navajo on the San Juan, plus two not involved here, Flaming Gorge and Curecanti, and a number of federal reclamation projects which were named as "participating projects," *i.e.,* participating in revenues from the named power plants in assisting repayment of their costs.[23]

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[23] Section 620d established a separate fund in the Treasury and directed that all revenues be paid into, and be appropriated out of, that fund for the purposes stated in the act, *e.g.,* retirement of the costs of the participating projects as well as the four main dams and power plants. Excess revenues are to be apportioned among the four States of the Upper Division, Colorado, New Mexico, Utah, and Wyoming, in stated percentages.

The act's purposes were stated to include the initiation of "the comprehensive development of the water resources of the Upper Colorado River . . . storing water for beneficial consumptive use," etc. (Sec. 620.) Section 620c provided that "the Secretary shall be governed by the Federal reclamation laws," and that all uses of water should be "subject to the apportionments of the use of water between the Upper and Lower Basins of the Colorado River and among the States of the Upper Basin fixed in the Colorado River Compact and the Upper Colorado River Basin Compact, respectively, and to the terms of the treaty with the United Mexican States."

5. *The Colorado River Basin Project Act of 1968*, 43 U.S.C. § 1501, et seq.

Section 1501 declares:

> "(a) It is the object of this Act to provide a program for the further comprehensive development of the water resources of the Colorado River Basin and for the provision of additional and adequate water supplies for use in the upper as well as in the lower Colorado River Basin."

To that end, the act authorizes the construction of the Central Arizona Project, implements the shortage provisions of the decree in *Arizona* v. *California*, authorizes participation by the United States in the cost of the Navajo Power Plant (discussed separately, *infra* at 34), authorizes planning for the importation of water to augment the supplies of the Colorado River Basin, provides for allocation of costs, creates a development fund into which revenues are to be paid and from which expenditures are to be appropriated, and directs the Secretary to make annual reports of consumptive use throughout the Basin.

Section 1551(b)(2) instructs him to

> "condition all contracts for the delivery of water originating in the drainage basin of the Colorado River system upon the availability of water under the Colorado River Compact."

Section 1551(c) provides:

> "(c) All Federal officers and agencies are directed to comply with the applicable provisions of this Act, and of the laws, treaty, compacts, and decree referred to in subsection (a) of this section, in the storage and release of water from all reservoirs and in the operation and maintenance of all facilities in the Colorado River system under the jurisdiction and supervision of the Secretary, and in the operation and maintenance of all works which may be authorized hereafter for the augmentation of the water supply of the Colorado River system."

This mandatory directive is basin-wide, operating in both the Upper and Lower basins.

Section 1552(a) provides:

> "(a) In order to comply with and carry out the provisions of the Colorado River Compact, the Upper Colorado River Basin Compact, and the Mexican Water Treaty, the Secretary shall propose criteria for the coordinated long-range operation of the reservoirs constructed and operated under the authority of the Colorado River Storage Project Act, the Boulder Canyon Project Act, and the Boulder Canyon Project Adjustment Act."

These criteria relate to storage of water in the four storage units of the Colorado River Storage Project, and releases from Lake Powell in a listed order of priority. The effect, in general terms, is to require that

storage in Lake Powell and Lake Mead be kept in balance.[24]

Section 1554 says:

> "Except as otherwise provided in this Act, in constructing, operating, and maintaining the units of the projects herein and hereafter authorized, the Secretary shall be governed by the Federal reclamation laws (Act of June 17, 1902; 32 Stat. 388, and Acts amendatory thereof or supplementary thereto) to which laws this Act shall be deemed a supplement."

Section 1555 directs:

> "Part I of the Federal Power Act shall not be applicable to the reaches of the main stream of the Colorado River between Hoover Dam and Glen Canyon Dam until and unless otherwise provided by Congress."

This reach encompasses the damsites of the controversial Hualapai and Marble Canyon hydroelectric power projects.

This act also authorizes construction of five "participating projects" which had been identified earlier in the Colorado River Storage Project Act. The legislative history of the Colorado River Basin Project Act shows that Congress intended that water be supplied to thermal-electric generating plants from these projects, pursuant to contracts with the Secretary of the Interior. See H.R. Rep. No. 1312, 90th Cong., 2d Sess., 3 U.S. Code Cong. & Admin. News 3666 (1968).

We submit that the Colorado River Storage Project Act and the Colorado River Basin Project Act extend

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[24] The operating criteria appear in 35 Fed. Reg. 8951 (1970).

to the entire Colorado River Basin the characterization employed by this Court in the third *Arizona* v. *California* case, 298 U.S. 558, 570 (1936), with respect to the effect of the Boulder Canyon Project Act in the Lower Basin:

> "Without more detailed statement of the facts disclosed, it is evident that the United States, by congressional legislation and by acts of its officers which that legislation authorizes, has undertaken, in the asserted exercise of its authority to control navigation, to impound, and control the disposition of, the surplus water in the river not already appropriated."

This control is explicitly and repeatedly vested in the Secretary, not the Commission.

6. *The Reclamation Project Act of 1939,* 43 U.S.C. § 485.

It was noted above that the Colorado River Storage Project Act, in Section 620c, and the Colorado River Basin Project Act, in Section 1554, directed that, except as otherwise provided, the Secretary shall be governed by the Federal reclamation laws in constructing, operating and maintaining the works authorized. The element of the Reclamation Laws which controls water and power contracts related to reclamation dams is the Reclamation Project Act of 1939.

Section 9(c) of that act, 43 U.S.C. Sec. 485h(c), authorizes the Secretary to enter into contracts "to furnish water for municipal water supply or miscellaneous purposes," [25] and to enter into contracts of "sale of

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[25] "Miscellaneous purposes" has been consistently construed by the Department and Congress to include "industrial purposes," and these, in turn encompass the furnishing of water to thermal-

electric power or lease of power privileges . . . in connection with the operation of any project or division of a project," and specifies minimum revenue requirements, related to operation, maintenance, payment of interest and other fixed charges. It concludes:

> "No contract relating to municipal water supply or miscellaneous purposes or to electric power or power privileges shall be made unless, in the judgment of the Secretary, it will not impair the efficiency of the project for irrigation purposes."

It thus delegates to the Secretary authority in the same field as that covered by the surplus water clause of Section 4(e) of the Federal Power Act, as explained by that section's legislative history (*infra* at 55).

7. *Special legislation relating to the Navajo Plant, on Lake Powell*

The Colorado River Basin Project Act of 1968, 43 U.S.C. § 1523, contained provisions relating particularly to the Navajo Plant. It directed the Secretary to submit to Congress a plan for federal acquisition of an interest in a thermal plant as a source of power for pumping water into and in the Central Arizona Aqueduct, construction of which was authorized by that act, and directed that water used by this plant be debited to the apportionment of 50,000 acre-feet of annual con-

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electric generating plants. *See, e.g.*, Dept. of Interior Memorandum of Associate Solicitor Fisher, October 26, 1956, cited in U.S. DEPT. OF INTERIOR, FEDERAL RECLAMATION AND RELATED LAWS ANNOTATED, VOL. 1, 658, n. 2 (1972) (diversion of water for thermal plant cooling purposes authorized by Reclamation Act of 1939); H.R. REP. No. 1312 (Colorado River Basin Project Act), 90th Cong., 2d Sess. (1968) (discussion of industrial uses of water to be provided by the project included cooling water for power plants at Animas-LaPlata, Dallas Creek and San Miguel).

sumptive use made to Arizona by Article III(a) of the Upper Colorado River Basin Compact, H.R. Doc. 717, 80th Cong., 2d Sess. A169 (1948). The Secretary made the required report September 30, 1969, stating that he intended to acquire 24.3% of the Navajo Plant's capacity for this purpose (Supplement at 106s-108s; 115 CONG. REC. 27585 (1969)). The Secretary, on January 17, 1969, entered into a contract with the Salt River Project Agricultural Improvement and Power District (Supplement at 110s) for water service from Lake Powell for the Navajo Plant, authorizing the diversion of 40,000 acre-feet and consumptive use of 34,100 acre-feet per annum, and in the same year he entered into a "Participation Agreement" with the owners of the plant, acquiring for the United States a 24.3% interest in its capacity for the purposes stated in the Colorado River Basin Project Act. These contracts incorporate detailed environmental controls. (Supplement at 110s). Congress has appropriated $149.5 million through F.Y. 1974, in payment of the federal share (estimated at $200,000,000) of the cost of the plant.[26]

8. *Special legislation relating to the use of water by the San Juan and Four Corners Plants from the Navajo Reservoir.*

It was noted, *supra,* at 29, that the Colorado River Storage Project Act authorized the Secretary to construct the Navajo Dam and Reservoir on the San Juan River in New Mexico. This was supplemented by

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[26] Act of Oct. 16, 1973, Pub. L. No. 93-97, 87 Stat. 318; Act of Oct. 25, 1972, Pub. L. No. 92-405, 86 Stat. 621; Act of Oct. 5, 1971, Pub. L. No. 92-134, 85 Stat. 365; Act of Oct. 7, 1970, Pub. L. No. 91-439, 84 Stat. 890; Act of July 6, 1970, Pub. L. No. 91-305, 83 Stat. 376; Act. of Dec. 11, 1969, Pub. L. No. 91-144, 83 Stat. 323.

the San Juan-Chama Project Act, 43 U.S.C. § 615ii et seq. Sec. 615ss(a) provides:

> "(a) No person shall have or be entitled to have the use for any purpose, including uses under the Navajo Indian irrigation project and the San Juan-Chama project authorized by sections 615jj and 615pp of this title, of water stored in Navajo Reservoir or of any other waters of the San Juan River and its tributaries originating above Navajo Reservoir to the use of which the United States is entitled under these projects except under contract satisfactory to the Secretary and conforming to the provisions of sections 615ii-615yy of this title.
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> * * * * *
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> "No long-term contract, except contracts for the benefit of the lands and for the purposes specified in sections 615jj and 615pp of this title, shall be entered into for the delivery of water stored in Navajo Reservoir or of any other waters of the San Juan River and its tributaries, as aforesaid, until the Secretary has determined by hydrologic investigations that sufficient water to fulfill said contract is reasonably likely to be available for use in the State of New Mexico during the term thereof under the allocations made in articles III and XIV of the Upper Colorado River Basin compact, and has submitted such determination to the Congress of the United States and the Congress has approved such contracts."

Sections 615uu(a), (b), and 615vv require the Secretary to comply with all the enumerated elements of the "Law of the River," require the inclusion of stipulations to that effect in all contracts, and give the consent of Congress to suits joining the United States as a party defendant in the event of noncompliance.

As to the San Juan Plant:

Pursuant to the foregoing authority, on April 11, 1968, the Secretary entered into a contract to store and deliver 20,200 acre-feet annually for use by the San Juan Plant, of which the estimated consumptive use was stated as 16,200 acre-feet per annum (Supplement at 123s). This contract was submitted to, and approved by, Congress in the Act of March 22, 1968,[27] which stated these quantities and described the proposed uses as "thermal electric generation."

As to the Four Corners Plant:

On October 10, 1958, the State Engineer of New Mexico granted the Utah Construction and Mining Company a permit (Supplement at 98s) to appropriate the use of the natural flow of the San Juan River to the extent of 51,000 acre-feet annually. Undivided rights in this permit to the extent of water requirements of the Four Corners Plant were assigned to the owners of that plant. The Act of March 22, 1968 (note 27, *supra*), approved a contract between the Secretary and Utah Construction Co. for the storage and delivery of 44,000 acre-feet annually from the Navajo Reservoir, for "Thermal electric generation," but water under that contract has not been made available to the Four Corners Plant.

It is clear that Section 4(e) of the Federal Power Act has no application to the Four Corners Plant, even assuming that that section encompasses steam plants. This is because this plant's uses of water are either (1) uses of natural flow, not stored water, hence, by

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[27] Pub.L. 90-272, 82 Stat. 52; 1 U.S. CODE CONG. & ADMIN. NEWS 63 (1968).

hypothesis, not "surplus water . . . from any Government dam," or (2) uses under a contract with the Secretary of the Interior, pursuant to that official's exclusive statutory authority to dispose of the use of water from the Navajo Reservoir, because, if water from Navajo Reservoir becomes available at all to the Four Corners Plant, it will be subject to the contract requirements of the San Juan-Chama Act, 43 U.S.C. § 615ss(a).

C. The decision below should be reversed and vacated as a moot advisory opinion, not applicable to the case before the Court.

In delegating plenary authority to the Secretary of the Interior to dispose of the consumptive use of water stored by federal dams in the Colorado River Basin, Congress has given no indication of an intent that the Federal Power Commission was being invited to stay on as a mother-in-law, cooking in the Secretary's kitchen. The Commission does not seek that nomination. When Congress referred to the Federal Power Commission in Colorado River legislation it did so in connection with hydroelectric projects only. *E.g.*, 43 U.S.C. § 1555. To hold that both the Commission and the Secretary should have power to fix the terms of a contract controlling the consumptive use of water stored by a government dam would, in the language of the Court in *Baker* v. *Carr,* 369 U.S. 186, 217 (1962), quoted with approval in *Gilligan* v. *Morgan,* 413 U.S. 1, 9 (1973), offer:

> ". . . the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

It was clearly unnecessary for the court below to construe the surplus water clause of Section 4(e) with respect to the Colorado River System. Its construe-

tion with respect to other river systems should await the day when such a case is before the court.

The court's decision should therefore be reversed and vacated as a moot advisory opinion.

Such is the established practice where a decision has been rendered moot by subsequent legislation, to avoid giving it the status of res judicata. *American Public Power Association, et al.* v. *Power Authority of the State of New York,* 355 U.S. 64 (1957), reversing and vacating as moot a judgment of the Court of Appeals for the District of Columbia Circuit, 247 F.2d 538 (1957); *Bryan* v. *Austin,* 354 U.S. 933 (1957); *United States* v. *Alaska S.S. Co.,* 253 U.S. 113, 116 (1920); *Board of Public Utility Commissioners* v. *Cia. General de Tabascos,* 249 U.S. 425 (1919). *Cf. McKay* v. *Clackamas County,* 349 U.S. 909 (1955); *Garcia* v. *Landon,* 348 U.S. 866 (1954); *United States* v. *Munsingwear, Inc.,* 340 U.S. 36 (1950); *United States* v. *Anchor Coal Co.,* 279 U.S. 812 (1929); *Brownlow* v. *Schwartz,* 261 U.S. 216, 218 (1923).

The same rationale requires that an opinion construing a statute which has been superseded by a later act, as in this case, should be vacated to avoid its res judicata status, even though the later statute itself antedated the court's construction of the predecessor act.

D. All of the complainants lack standing to litigate the issue of jurisdiction between the Secretary and the Commission.

1. *Injury in fact to the plaintiff is an element essential to the establishment of his standing to sue.*

The issue for decision in this case (if a decision were to be reached on the merits) is whether the Secretary of the Interior or the Federal Power Commission has

jurisdiction to grant the right, by contract or license, to the consumptive use of water stored by government dams in the Colorado River Basin. None of the complainants could be affected in the slightest by the decision of this issue one way or the other, hence none has standing to litigate it.

The Secretary and the Commission are equally subject to the environmental statutes, *e.g.*, the Clean Air Act, 42 U.S.C. § 1857, the 1972 amendments to the Federal Water Pollution Control Act, 33 U.S.C. § 1251, the National Environmental Policy Act, 42 U.S.C. § 4321. The environmental concerns expressed by the complainants here can be protected in suits under those acts [28] against the one official just as well as in suits against the other.[29]

The Chemehuevi and Cocopah Tribes, being the only complainants owning water rights in the Colorado River, offer these as a special basis for asserting potential injury. Actually, the Law of the River not only completely insulates them from any such possibility, but precludes an attack by them, *qua* water uses, on the use of water by any of the six power plants.

The decree in *Arizona* v. *California*, 376 U.S. 340 (1964), awarded, of the first 7,500,000 acre-feet of consumptive use of main stream water available for release from Hoover Dam, 2,800,000 acre-feet for use in Arizona, 4,400,000 acre-feet for use in California, and 300,000 acre-feet for use in Nevada (Art. II(B)(1)).

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[28] For example, all of the complainants except the two tribes were plaintiffs in the *Jicarilla* environmental case against the Secretary of the Interior.

[29] See the environmental provisions contained in the water use contracts on file with the Court.

The Chemehuevi uses are part of the decreed apportionment to California. Those of the Cocopah are part of the decreed apportionment to Arizona. Article II (D)(1), (2) of the decree awards "present perfected rights" (defined in Article I(G), (H)) to

> "(1) The Chemehuevi Indian Reservation in annual quantities not to exceed (i) 11,340 acre feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 1,900 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of February 2, 1907;
>
> "(2) The Cocopah Indian Reservation in annual quantities not to exceed (i) 2,744 acre feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 431 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of September 27, 1917;"

These rights are of such high priority, and the quantities are so small in comparison with the quantities apportioned to the respective States, that in no conceivable circumstances could use of water by any water user in any State cause shortages to the Chemehuevi or Cocopah Tribes. Article II(B)(3) fully protects these present perfected rights in the event of shortage.

Beyond this, legislation implementing the decree makes it doubly certain that shortages, if any, shall be borne by others than holders of present perfected rights. Colorado River Basin Project Act, 43 U.S.C. § 1521(b).

By the same token, the use of water by the Mohave Plant, in Nevada, is shielded by Article II(B)(1) of the decree from attack by users in other States of the Lower Basin, including the Chemehuevis in California and the Cocopahs in Arizona. This is because the use by the Mohave Plant is within the 300,000 acre-feet apportioned to Nevada by that article, and is made pursuant to contracts of the Secretary (Supplement at 99s) executed pursuant to the requirement of such contracts stated in Article II(B)(5).

Both the Secretary and the Commission are included in the injunction imposed by Article II against releases otherwise than in accordance with the decree.

Nothing that either the Secretary of the Interior or the Federal Power Commission might do or refuse to do could diminish or enlarge the decreed rights to use of water held by the Chemehuevi or Cocopah Reservations, or, for that matter, the decreed water rights of Nevada, used in operation of the Mohave Plant, attacked by these complainants.

The Colorado River Compact is a positive bar to any complaint by these tribes against the use of water by any of the five plants in the Upper Basin.

That compact, in Article III(a), provides:

> "(a) There is hereby apportioned from the Colorado River System in perpetuity to the Upper Basin and to the Lower Basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist."

Article III(d), (e) provides:

> "(d) The States of the Upper Division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre-feet for any period of ten consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of this compact.
>
> "(e) The States of the Upper Division shall not withhold water, and the States of the Lower Division shall not require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses."

Uses of water by the five plants in the Upper Basin are within the compact entitlement of the Upper Basin. The exercise of these apportioned rights cannot give rise to actionable injury to any water user in the Lower Basin. Such is the very purpose of the compact. This is in addition to the fact that, in view of the guarantee of water to the Lower Basin in Article III(d), no use by these plants could conceivably cause shortages to those tribes. The guaranteed supply, averaging 7,500,000 acre-feet annually, is over 500 times their total decreed diversion rights and thus over 1,000 times their decreed consumptive use requirements.

Consequently, as in the case of the Lower Basin Mohave Plant, a decision as between the licensing authority of the Secretary or that of the Commission, with respect to the five power plants in the Upper Basin, could not affect the water rights of the Chemehuevi and Cocopah Tribes. Lacking injury, they lack standing to demand that the water rights of the five Upper Basin plants be conditioned on issuance of Federal Power Commission licenses to use surplus water.

II.

THE RATIONALE OF THE COURT'S PROPER "PROJECT WORKS" HOLDING SHOULD HAVE CONTROLLED ITS DISPOSITION OF THE "SURPLUS WATER" ISSUE.

A. The text of the act plainly relates only to hydroelectric projects, to the exclusion of thermal plants, regardless of the source of the water that they use.

Steam-electric power generation cannot be made to fit the Procrustean bed of a statute wholly designed to regulate the development of water power, the Federal Water Power Act.

The act, in terms, (1) relates the Commission's licensing jurisdiction only to hydroelectric projects, not thermal projects, and (2) makes no exception of thermal plants using surplus water from government dams.

The lower court concedes the major premise (App. 73):

> "We agree with intervenors that it is unlikely that, if Congress had intended to include the regulation of thermal-electric generation as a basic purpose of the Act, it would have limited reference in the preface to hydroelectric power—the lesser utilized of the two sources of electric power generation. The explicit reference to only hydroelectric power is consistent with the legislative history of concern with promoting the 'comprehensive development of water power.'" (Footnotes omitted.)

The court goes on to say "[o]ther provisions of the Act bear this out," and catalogues Section 4(a), 16 U.S.C. Sec. 797(a), and Section 24, 16 U.S.C. Sec. 818, which, it says, "single out" water power and water-power development for study and planning.

The statute, in addition to these, contains a long list of paragraphs which are identified with the use of

water power, never with thermal power, and so of course never making a distinction between thermal plants using water from navigable streams and thermal plants using surplus water from government dams. All are outside the statute.

For example:

The definitions of "project," and "project works," in Section 3(11) and (12), are in terms which the court held excluded thermal power plants which use water of navigable streams, and included only hydroelectric projects (App. 75). Examination of the language of paragraph (11) shows it equally inapplicable to the identification of *all* thermal power plants. The references are all keyed to the works which carry water under pressure down to and through the turbines, propelled by this pressure, and the control equipment for these hydraulic works. Had it been intended to include steam plants using surplus water from a government dam in the scope of the Water Power Act, a definition of the elements of a thermal power plant (*e.g.*, boilers, steam turbines, condensers, fuel handling and ash disposal facilities, railroad yards, etc.) would have been as essential as a definition of the elements of a hydroelectric plant. "Project" and "project works" are terms of art, reappearing throughout the act. Insofar as hydraulic features of a thermal plant are concerned, they are the antithesis of those of a hydroelectric project. The steam plant's water system is keyed to pumps, not turbines, lifting water uphill, not directing it downhill, for consumption in conversion of energy supplied by fuels, not by falling water.

The text of the act is consistent in its focussing on water power. See, in addition to the sections cited by

the court, Section 4(f) in conjunction with Section 9 (preliminary permits), Section 4(g) (orders to conserve and utilize the navigation and water power resources of the region), Section 10(a) (comprehensive plans for improvement and utilization of water power development), Section 10(b) (any dam or project works), Section 10(c) (maintenance of project works in a condition of repair adequate for the purposes of navigation), Section 10(e) (payment for the development and utilization of power created by any government dam), Section 10(f) (payments for benefits to a project not under license, occasioned by an upstream dam), Section 12 (protection of interests of navigation), Section 13 (inclusion of locks), Section 14 (right of U.S. to take over a project, including locks), Section 18 (maintenance of navigation aids, fishways, etc.), Section 21 (power of eminent domain over property necessary for a dam, reservoir, diversion structure, and appurtenant works, if justified for improving or developing a waterway), and so on.

. would be remarkable to discover, latent in one subsection, an unspoken intent that the act encompass use of water in one kind of thermal plant (excluding all others), whereas all other sections of the act which refer to use of water for power purposes do so in terms which make sense only if they are related to hydroelectric development of a waterway.

The quantities of water diverted and used by a steam plant in boilers and cooling apparatus are miniscule compared to the quantities required by a hydroelectric project generating the same quantity of power, and Congress, concerned with the development of water

power, had no reason to concern itself with the insignificant quantities of water used by thermal plants.[30]

B. The opinion below conflicts with decisions made by Congress in 1935 in amending the Federal Water Power Act.

In 1935 the Water Power Act was amended by Title II of the Public Utility Act of 1935 and was made Title I of the Federal Power Act. The 1935 Act added Titles II and III to the Federal Power Act to regulate the interstate transmission and sale of electricity. In the course of considering amendments, Congress made several decisions relevant to the present case.

1. In 1935, two bills, H.R. 5423, and S. 1725, were introduced which proposed to require public utilities to obtain certificates of public convenience and necessity for the construction of transmission and production facilities. Section 204(a) of both bills stated as follows:

> "Sec. 204. (a) No public utility shall undertake the construction or extension of any facilities . . ., or engage in production or transmission by means of any such new or additional facilities . . . unless and until there shall first have been obtained from the Commision a certificate that the present or future public convenience and necessity require or will require such new construction . . . ."

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[30] For example, the Glen Canyon Dam power plant, with the reservoir at normal operating elevation, is capable of generating 1,092 megawatts of power by passing 28,000 cubic feet of water per second through the turbines. In comparison, the Navajo steam plant, using boiler and cooling water from the same reservoir, consumes only 47 cubic feet per second (34,100 acre-feet per year) in generating 2,310 megawatts of power by burning coal. Each megawatt produced by steam at Lake Powell thus requires availability of less than one tenth of one percent of the water required to produce each megawatt by the hydroelectric power plant there.

The scope of the certification provision, over steam plants and transmission lines used in interstate commerce, was explained during committee hearings:

> "The CHAIRMAN: Let me ask you a question right there: It has been stated to me that in event some power company desired to build a plant, a transformer, or something of that kind, within a State, particularly another plant in a State, that this would give the Federal Power Commission the right to say that they would not be allowed to do it. What about that?
>
> "Mr. DEVANE: If it was a facility used in connection with the transmission of energy in interstate commerce, this bill does require such a company to come to the Commission for a certificate of convenience and necessity. If it is a facility that is used solely for the producton of energy used in intrastate commerce, they would not have to come. There is an effort to secure control of the construction or the abandonment of facilities used in interstate commerce." *Hearings on Public Utility Holding Company Act of 1935 Before the Senate Comm. on Interstate and Foreign Commerce,* 74th Cong., 1st Sess. 249-50 (1935); *see also* the testimony of Dozier DeVane, FPC Solicitor, *id.* at 257-59.

The Commission proposal was viewed with alarm. As one Senator said, "this business of telling people whether they shall operate a plant . . . . [t]hat is the dangerous thing, to my mind." *Id.* at 259.

The proposal to extend jurisdiction over "production facilities," including steam plants, was not accepted by Congress. S. REP. No. 621 (S.2796), 74th Cong., 1st Sess. 20 (1935).

The significance of this proposed amendment, and its rejection, is clear. If Congress rejected the notion that

steam plants should be subject to certification procedures in Title II of the new Federal Power Act, it did not intend to subject those same plants, as "project works" or users of "surplus water," to the licensing procedures of Title I of the Act, embodying the Federal Water Power Act.

2. Section 10(e), 16 U.S.C. § 803(e), which relates to charges payable by licensees, was amended in 1935 by adding a proviso referring to dams or structures in reclamation projects, requiring, in such case, the approval of the charges by the Secretary, and, in the case of such structures on tribal lands, the approval of the Indian tribe, subject to readjustment of charges at the end of 20 years and each 10 years thereafter. Use of surplus waters from reclamation dams by hydroelectric projects had always been subject to charges under the Federal Power Act. The new feature was requirement of approval by the Secretary. The receipts continued to go into the Treasury, for allocation under Section 17 of the Federal Power Act, 16 U.S.C. § 810, among various funds and beneficiaries. All this was changed, as to the Colorado River Basin, by Section 5 of the Colorado River Storage Project Act, 43 U.S.C. § 620(d), and Section 403 of the Colorado River Basin Project Act, 43 U.S.C. § 1543, which direct that revenues collected in connection with all Upper Basin dams and water contracts involved here should be allocated among funds and beneficiaries quite different from those named in the Federal Power Act. Revenues received by the Secretary from the Mohave Plant's use of water, in the Lower Basin, are controlled by Section 2 of the Boulder Canyon Project Adjustment Act, 43 U.S.C. § 618a, enacted in 1940.

3. Congress adopted an amendment to Section 10(f) in 1935 which negates the lower court's assumption that the existence of an upstream government dam imposes the requirement of a license on downstream power plants benefited thereby.

Section 10(f), 16 U.S.C. § 803(f), as amended in 1935, provides otherwise, even with respect to hydroelectric projects:

> "Whenever any power project *not under license* is benefited by the construction work of a licensee or permittee, the United States or any agency thereof, the Commission, after notice to the owner or owners of *such unlicensed project*, shall determine and fix a reasonable and equitable *annual charge to be paid* to the licensee or permittee on account of such benefits, or *to the United States if it be the owner of such headwater improvement.*" (Emphasis added.)

The consequence that the statute imposes on the downstream power plant benefiting from a government upstream dam is *not* the necessity for acquisition of a "surplus water" license, but the necessity of paying for the benefits thus received by this "unlicensed project." There could not be such a thing as an unlicensed project "benefited by the construction work of . . . the United States," if the opinion below were correct.

So far as we have found, in only one case in 54 years has the Commission undertaken to invoke the surplus water clause of Section 4(e) with respect to such downstream plants, even for licensing of a hydroelectric project, and in that case this same court of appeals set the Commission's order aside. It did so independently of the 1935 amendment.

In *California Oregon Power Co.*, 13 F.P.C. 1, 4 (1954), 15 F.P.C. 14 (1956), the Commission asserted licensing jurisdiction over certain hydroelectric plants (two of which were 57 and 59 miles downstream from a government dam). In our case the court quotes with apparent approval from the 1954 FPC decision in that case (App. 99):

> "Where there is available stored water not to be used in irrigation, which represents storage over and above that needed for irrigation, and which would otherwise flow unused down the main channel of the stream, that water is 'surplus water,' and, if used for power development, would require a license from this Commission."

But this same court, in *California Oregon Power Co. v. FPC*, 239 F. 2d 426 (D.C. Cir. 1956), dismissed a petition for review of that FPC decision because of lack of a justiciable controversy (these being navigable waters, thus affording "admitted jurisdiction"). In doing so, it expressed its skepticism about the Commission's definition of "surplus waters," quoted above, which the same court now embraces:

> "... even counsel for the Commission is uncertain that this definition is correct.
>
> * * * * *
>
> "The record is, in fact, in such a state that we could hardly hold (if we reached the question) that Copco has been shown to be a user of surplus water, on any theory." *Id.* at 432.

Nevertheless, the court in the present case appears to have adopted, with respect to *steam* plants, the jurisdictional basis that it declined to adopt in the earlier case, with reference to *hydroelectric* plants, *i.e.*, use of water flowing in a stream below a government dam.

C. Prior construction of the Federal Power Act by this Court removes any doubt as to the act's inapplicability to the licensing of fossil-fuel steam plants.

Years ago, this Court recognized that the Act was "distinctly an effort to provide federal control over and give federal encouragement to water power development." *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152, 180 n. 23 (1946). In another decision, the Court stated:

> "the plan of the Act is one of reasonable regulation of the use of navigable waters, coupled with encouragement of their development as power projects by private parties." *FPC v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 251 (1954).

Against this background of judicial recognition of the scope of the Federal Power Act, the Court decided the *Taum Sauk* case, *FPC* v. *Union Electric Company*, 381 U.S. 90 (1965). There, the Court held that a pumped storage project, as a hydroelectric facility not affecting a navigable stream but affecting interstate commerce, was subject to FPC jurisdiction. In disposing of the company's arguments seeking to avoid federal jurisdiction, the Court addressed the company's argument "that an anomalous consequence flows from the Commission's construction of the Act and its view that steam plants generating large amounts of energy for interstate transmission are not within the scope of § 23(b). . . ." 381 U.S. at 109. The argument was that since jurisdiction over a pumped storage project rested on the interstate transmission of energy, "there can be no basis for distinguishing between a steam plant and a hydroelectric facility both generating energy for interstate use." *Id.* at 109-10. The Court had little difficulty in disposing of this argument.

> "The answer to this conundrum is that unlike Part II [of the Act], under which the Commis-

> sion regulates various aspects of the sale and transmission of energy in interstate commerce, Part I, the original Federal Water Power Act, is concerned with the utilization of water resources and particularly the power potential in water. In relation to this central concern of the Act, the distinction between a hydro electric project and a steam plant is obvious, and meaningful, although both produce energy for interstate transmission." *Id.* at 110 (footnote omitted).

The dissenting Justices agreed:

> "The legislative history here, however, establishes to my satisfaction that it has required licenses of neither steam plants nor the type of hydroelectric plant here involved. . . ." *Id.* at 115.

Certainly, steam plants using "surplus water" cannot be carved out as an exception to the Court's rationale.

D. The administrative construction of the act, reported to Congress for more than a half-century, has consistently related the Commission's licensing jurisdiction solely to hydroelectric power, with no exception for thermal plants using surplus water from government dams.

In 1921, in its first annual report, the FPC noted that "the Commission is limited to the consideration of projects designed to produce water power."[31] This has been the consistent Commission policy ever since. As recently as 1972, FPC Chairman Nassikas testified that:

> "Except for our hydroelectric licensing authority, we do not license any generating facility. While the Atomic Energy Commission licenses nuclear

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[31] FPC, First Annual Report 138, 155 (1921).

> steam generating plants, there is no Federal licensing currently of fossil fuel steam generating plants. . . .
>
> * * * * *
>
> "Part I licensing procedures do not apply to the licensing of fossil or thermal electric generating facilities." [32]

In the meantime, Congress had several times received similar expressions from the Commission,[33] other agencies of the executive branch, and interested parties [34] (including the Sierra Club), and, as the court below recognized, had amended the act on several occasions (App. 76). It is not only significant, as the court below recognized, that Congress expressed no dissatisfaction with this administrative construction; it is also significant that in none of these dialogues between the Commission and Congress did either of them suggest the notion that while thermal plants using the waters of a navigable stream were excluded from the Commission's licensing jurisdiction, these same thermal plants were nevertheless included in that jurisdiction, if a government dam were located upstream.

The court of appeals recognizes that the Commission's consistent administrative construction has been

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[32] *Hearings on Interim Nuclear Licensing Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 92d Cong., 2d Sess. 249, 261 (1972).

[33] 1962 FPC ANNUAL REPORT, 12-13; 1966 FPC ANNUAL REPORT, 8-9; I FPC NATIONAL POWER SURVEY 100-01 (1964).

[34] *E.g.*, Interior Department, Office of Science and Technology, EPA, AEC. *Power Plant Siting and Environmental Protection, Hearings Before the Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce*, 92d Cong., 1st Sess. (1971).

that "the Commission is limited to the consideration of projects designed to produce water power" (App. 74); that this consistent administrative interpretation is entitled to "great weight," *Udall v. Tallman,* 380 U.S. 1 (1965); *Power Reactor Development Co. v. International Union,* 367 U.S. 396 (1961), and that this is particularly true, having been an interpretation given in the initial implementation of the act, communicated to Congress; and that Congress, in repeated amendments of the act, "gave no hint of congressional desire to override the Commission's construction of the scope of its jurisdiction" (App. 76).

The Commission's administrative construction has never suggested the distinction made by the court below. There is no justification for reading into it an exception that is not there.

III.

THE LEGISLATIVE HISTORY OF THE FEDERAL WATER POWER ACT PROVES THAT CONGRESS AUTHORIZED THE FPC TO REGULATE ONLY HYDROELECTRIC UTILIZATION OF SURPLUS WATER FROM GOVERNMENT DAMS, AND THAT CONGRESS SPECIFICALLY REFUSED TO INCLUDE IN THE WATER POWER ACT PLENARY AUTHORITY OVER OTHER WATER USES.

A. Early legislation, bills leading to enactment of the Federal Water Power Act, and congressional debates all show that Congress was only concerned with use of surplus water in generating hydroelectric power.

For the Court's convenience, we have submitted a separately bound Supplement to our brief containing a detailed account of legislative history. The following is a summary.

The legislative history of the surplus water clause, and its common meaning and usage both prior to, and

subsequent to, enactment of the Federal Water Power Act reveal that the Act's jurisdiction extended solely to hydro power.[35] The congressional debates, discussions, committee reports, and proposed bills mention "surplus water" *only* in the context of hydroelectric generation. Reference to utilization of surplus water in Section 4(e) and Section 10(e) of the Act, or their earlier counterparts, was always in relation to water power, and nothing else. The idea of conferring on the Commission licensing jurisdiction over the utilization of surplus water for irrigation, domestic water supply, steam plants, or other consumptive uses was never advanced. When irrigation was mentioned, it was in the context of preserving states rights versus the federal government and avoiding impairment of irrigation opportunities. When steam power was mentioned (as it was) it was in the context of steam plants as unlicensed competition with licensed water power projects,[36] consuming coal which could be conserved and replaced by hydro power.

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[35] The history will show that often the terms "surplus water" and "water power" were intertwined. The discussions of both expressions seem to assume a benefit to the licensee derived from the change in the elevation of the water surface made by the dam, rather than a change in the regimen downstream. What is clear is that both expressions related only to hydroelectric generation. A distinction between leases of government-owned facilities and leases of surplus water appeared in 1928 in Section 6 of the Boulder Canyon Project Act, 43 U.S.C. § 617(e).

[36] *E.g.*, 51 CONG. REC. 12336, 12593, 12777 (1914); 53 CONG. REC. 2640, 10450 (1916); 56 CONG. REC. 8931, 9282 (1918); 59 CONG. REC. 1101, 1430, 1473 (1920); *Hearings on S. 1419 Before the House Committee on Water Power*, 65th Cong., 2d Sess. 166-83 (1918).

Statutes involving surplus water, 1888-1914

In early years, Congress passed three types of statutes[37] dealing with regulation of hydroelectric development. These, as noted in a speech made on the Senate floor in 1913 related to: (i) "dams constructed by acts of Congress where surplus water, not needed for navigation, has been leased for water power purposes"; (ii) "where dams, or dams and locks, are to be constructed in the future by the Government, the water power created incidentally thereto shall be leased under the direction of the Secretary of War"; and (iii) "acts of Congress granting permission to lessees to construct dams in navigable streams subject to various conditions." 49 CONG. REC. 2601-03 (1913) (remarks of Senator Burton). Under these acts, licenses were issued on a project by project basis.

The earliest legislation[38] involving lease of surplus water was an appropriations act for rivers and harbors in 1888. Act of August 11, 1888, ch. 860, 25 Stat. 400. The following provision was made:

> "[T]he Secretary of War is hereby authorized and empowered to grant leases or licenses for the use of the *water powers* on the Muskingum River at such rate and on such conditions and for such periods of time as may seem to him just, equitable,

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[37] See S. Doc. No. 57, 62d Cong., 1st Sess. (1911), for a listing of early statutes involving government dams.

[38] Perhaps the earliest mention of "surplus water" is in a deed of property on the Fox River in Wisconsin to the United States by the Green Bay and Mississippi Canal Co. between 1870 and 1872. The deed is cited but not quoted in Kaukauna Water Power Co. v. The Green Bay & Mississippi Canal Co., 142 U.S. 254, 259 (1891).

> and expedient: *Provided,* That the leases or licenses shall be limited to the use of the *surplus water* not required for navigation." *Id.* at 417 (emphasis added).

From 1890 through 1909, Congress enacted seven more statutes,[39] containing similar language, for the lease of surplus water for power development. These statutes, comprising the basis of the comprehensive water power bill discussions commencing in 1914, culminating in the 1920 Act, have a common thread. The historical usage of the term "surplus water" applied only to the development of water power.[40] This principle continued, and was not altered in the many proposed bills, amendments, and discussions leading to the enactment of the comprehensive water power act. Congress considered new legislation "in view of the provisions of the legislation already enacted," and effect should be given to them. *St. Louis, Iron Mountain & Southern Ry. Co. v. United States,* 251 U.S. 198, 207 (1920).

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[39] These statutes were:

Act of Sept. 19, 1890, ch. 907, 26 Stat. 426, 447 (Green and Barren Rivers); Act of June 13, 1902, ch. 1079, 32 Stat. 331, 358, *as amended,* Act of June 28, 1902, ch, 1299, 32 Stat. 408, 409 (Cumberland River); Act of March 6, 1906, ch. 517, 34 Stat. 52 (Muscle Shoals); Act of April 23, 1906, ch. 1660, 34 Stat. 130 (Bear River); Act of May 9, 1906, ch. 2438, 34 Stat. 183, 184 (Coosa River); Act of June 25, 1906, ch. 3530, 34 Stat. 456, 457 (Study Commission); Act of March 4, 1907, ch. 2912, 34 Stat. 1288 (Coosa River, Lock Twelve); Act of March 3, 1909, ch. 264, 35 Stat. 815, 819 (Wabash River).

[40] That is, to power created by use of the kinetic energy of falling water.

Legislative proposals, 1914-1915 (63d Congress)

In 1914, Congress considered for the first time legislation to regulate water power in a comprehensive manner, as opposed to the earlier piecemeal regulation of individual projects and private licenses. Two bills, the Adamson bill, H.R. 16053, dealing with control of power on navigable streams, and the Ferris bill,[41] H.R. 16673, dealing with water power development on public lands, were introduced.

Section 14 of the Adamson bill contained a provision dealing with surplus water, which, as introduced and reported to the House floor read:

> "That the Secretary of War, upon the advice and with the approval of the Chief of Engineers, may lease to any applicant having complied with the laws of the State in which the dam is constructed or to be constructed by the United States, *the right to develop power from the surplus water over and above that required for navigation at any navigation dam now or hereafter constructed, either with or without contribution by the applicant,* and owned by the United States, and on such terms as may be deemed by the Secretary of War, and Chief of Engineers for the best interests of the United States, and in awarding such lease preference shall be given to the applicant whose plans are deemed by any action of Congress or by the Secretary of War and Chief of Engineers to be best adapted to conserve and utilize in the public interest the *navigation and water power resources of the region,* and all such leases and the parties

[41] As with all public lands bills, the Ferris bill contained no mention of surplus water. H.R. Rep. No. 842, 63d Cong., 2d Sess. (1914).

thereto and the terms and conditions thereof shall be reported annually to Congress." 51 CONG. REC. 11415 (1914) (emphasis added).

The report of the House Committee on Interstate and Foreign Commerce explained that:

> "Section 14 is a new section authorizing the Secretary of War, with the approval of the Chief of Engineers, to lease to any applicant who has complied with the laws of the State in which the dam may be located any surplus power developed by a dam that is constructed or owned by the United States for the purposes of navigation." *Id.* at 11070.

Remarks of congressmen during discussion of Section 14 support the view that only water power uses of surplus water were to be regulated. Congressman Mann stated:

> "We have many navigation dams in the United States. At many of them *there is surplus water which may be used for the development of water power*, and we authorize the Secretary of War to *lease that surplus water power* and to make charges for it." *Id.* at 11403 (emphasis added); see *id.* at 12330 (remarks of Mr. Lenroot).

And Congressman Brown, in extended remarks concerning Section 14, stated:

> "Section 14 is entirely in keeping with the rest of the bill. It permits the Secretary of War and the Chief of Engineers to lease the right to develop power from the surplus water flowing over any dam, present or future, for any length of time, with or without consideration." *Id.* at 768 (Appendix).

Congressman Stevens of New Hampshire offered an amendment to H.R. 16053. The surplus water

clause in this amendment [42] closely resembles the language adopted in the Federal Water Power Act. *Id.* at 13256-60. The debate surrounding the Stevens amendment shows that the House did not propose to reach non-hydro-power uses with the "use of surplus water" language. The author explained the effect of his proposed amendment on Section 14:

> "[T]he only substantial change made in section 14 by the amendment which I have offered is that no lease of water-power rights to anyone shall be for a longer period than 50 years.
>
> ". . . no *lease of water-power* rights which belong to the Government should be given in perpetuity to any corporation, private or public." *Id.* at 13257 (emphasis added).

Congressman Adamson, the sponsor of H.R. 16053, reacted to the Stevens amendment:

> "[I]f the committee [referring to the House] thinks that it is more likely to serve the purpose intended, it is all right with me. I can not see any difference." *Id.* at 13256.

The Stevens substitute to Section 14 was agreed to by the House on August 4, 1914, *id.* at 13260, the date the Adamson bill was approved. *Id.* at 13276. The bill was sent to the Senate, whereupon it was referred to the Committee on Commerce on August 5, 1914, *id.* at 13296, which reported a substitute bill, S. 6413, on which no action was taken. S. REP. No. 846, 63d Cong., 3d Sess. (1914).

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[42] "That the Secretary of War be, and he is hereby, authorized to enter into leases for the use of surplus water and water power generated at dams and works constructed wholly or in part by the United States. . . ."

Legislative proposals, 1916 (64th Congress)

The scope of the surplus water clause was not altered in the congressional activities in 1916. Congress primarily considered two bills in 1916, the Ferris bill [43] in the House, and the Shields bill, [44] S. 3331 in the Senate. The Shields bill contained the following language concerning utilization of government dams:

> "Sec. 10. The Secretary of War may lease . . . *the right to utilize the surplus water power over and above that required for navigation at any navigation dam now or hereafter constructed,* either with or without contribution by the applicant, and owned by the United States . . . ." 53 CONG. REC. 2198 (1916) (emphasis added).

Although the term "surplus water" is not expressly included in S. 3331, it is apparent from the debates that Section 10 [45] was intended to incorporate surplus water in the term "surplus water power." Senator Shields explained the provision of his bill in the following manner:

> "Under Section 10 . . . provision is made for payment of the excess of water arising from dams built solely by the Government. . . ." *Id.* at 3064.

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[43] H.R. 408 dealt with public lands, and contained no reference to surplus water.

[44] In the 65th Congress, S. 1419 was also known as the Shields bill.

[45] The Senate committee report contains the following summary of Section 10, which indicates that the term "surplus water power" includes the concept of leasing surplus water, and that the section is limited to taking advantage of water power at government dams and does not extend to any other use of federal projects:

> "The bill also provides for the lease of water power in excess of that needed for operation and navigation facilities, incidentally produced by dams heretofore or which may be hereafter constructed by the United States in the improvement of navigable rivers. . . ." S. REP. No. 89, 64th Cong., 1st Sess. 4 (1916).

S. 3331 passed the Senate with Section 10 virtually unchanged. However, the House Committee on Interstate and Foreign Commerce struck out the entire bill and substituted a new bill. Section 19,[46] relating to the use of government dams stated:

> "Sec. 19. That the Secretary of War be, and he is hereby, authorized to enter into leases for the use of surplus water and water power generated at dams and works constructed wholly or in part by the United States in the interests of navigation. . . ." H.R. REP. No. 404, 64th Cong., 1st Sess. 6 (1916).

The House report explained that Section 19 was limited to the leasing of power created at federal dams, as had been the case for many years:

> "Section 19 regulates the method to be pursued by the War Department in *leasing the power* at dams erected in whole or in part by the Government itself. It contains substantially the same provisions passed by the House two years ago *and continues the method existing as to Government dams for many years, under which the War Department has satisfactorily regulated and leased surplus water at a number of such structures.*" *Id.* at 11 (emphasis added).

The language indicates that the purpose of the "surplus water" clause was to systematize a procedure which had been carried on in a piecemeal manner for many years. Plainly, the House intended the clause only to apply to such uses of surplus water as had been licensed in the past, *i.e.*, water power projects at federal dams.

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[46] The section is identical to Section 14 of H.R. 16053 as passed by the House in 1914.

At the close of this session, Congress had before it two bills concerning the use of government dams. The Shields bill, S. 3331 (Section 10), referred to "surplus water power" while the House substitute bill (Section 19) referred to "surplus water and water power." To Congress, both clauses meant the same thing. For example, Congressman Kent, in analyzing the Senate bill and the House substitute, interpreted the Senate bill, which contained the language "surplus water power" but not "surplus water," as follows:

> "The Secretary of War may lease, on such terms as he may provide, the right to develop power from surplus water at dams owned by the United States and where the cost of construction is borne by the United States or jointly with lessee." 53 CONG. REC. 1559 (Appendix) (1916).

In discussing the House substitute (which used the term "surplus water"), Kent stated the appropriate section:

> "[p]rovides that Secretary of War is authorized to lease surplus water and water power generated at Government dams for not to exceed 50 years upon terms provided by the Secretary, with periodical readjustment of rentals."[47] *Id.*

Obviously to Congressman Kent, and surely to other members of Congress, the two bills applied to the same subject—utilization of the hydroelectric potential of government dams. The principle remained unchanged in Congress next session.

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[47] Mr. Kent submitted a comparative analysis, section by section, in the Congressional Record. 53 CONG. REC. 1558-60 (Appendix) (1916).

Legislative proposals, 1918 (65th Congress)

In 1918, the Senate passed S. 1419 (the Shields bill), which contained a provision on surplus water identical to the wording of Section 10 of S. 3331 of the previous Congress, indicating the Senate's intent concerning the use of federal dams had not changed. The Senate report summary of Section 10, S. REP. No. 179, 65th Cong., 2d Sess. 4 (1917), is identical with the report in the previous session.

The House Committee on Water Power considered a substitute bill, a Wilson administration proposal, which for the first time included public lands and navigable waters in the same bill. In Section 4(d) of the substitute as introduced in committee, which is now Section 4(e), the Federal Power Commission was authorized:

> "To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation, State or municipality, for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation, and for the development, transmission, and utilization of power across, along, or in any of the navigable waters of the United States or upon any part of the public lands and reservations of the United States (including the Territories), *or for the purpose of utilizing the surplus water or water power over and above that required for navigation at any navigation dam now or hereafter constructed, either with or without contribution by the applicant, and owned by the United States,* which licenses shall be irrevocable, except as herein pro-

vided . . . ." H. REP. No. 715, 65th Cong., 2d Sess. 23 (1918) (emphasis added).[48]

The bill as reported by the Committee on Water Power to the House floor contained one amendment relating to the "surplus water" clause. The clause was amended to read:

> ". . . or for the purpose of utilizing the surplus water or water power *from any navigation dam* . . . ." *Id.* at 3 (emphasis added).

The word "at" was changed to "from"[49] and the phrases "over and above that required for navigation" and "now or hereafter constructed either with or without contribution by the applicant, and owned by the United States" were struck from the clause. This deletion, however, does not indicate that the definition of surplus water had been changed.

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[48] Three features about this section are worth noting. First, the authority to lease surplus water is combined with the authority to license project works. Heretofore, regulation was pursuant to separate sections.

Second, the conjunction "or" is used between the terms "surplus water" and "water power" instead of "and" as in previous bills. It is not clear why this change was made, but there is no historical authority for concluding that the alteration of language indicates an intent of Congress to expand the Commission's licensing jurisdiction over surplus water.

Third, the language of the "surplus water" clause indicates that the definition had not been changed since the early bills. Surplus water is still computed by deducting that amount of water needed for navigation from the total quantity of water flowing at the dam.

[49] Changing the term "at any navigation dam" to read "from any navigation dam" did not alter the meaning of surplus water. The term "from" was equated as identical in meaning with surplus water "generated from" or "created from" a government dam. *Hearings on S. 1419 Before the House Committee on Water Power*, 65th Cong., 2d Sess. 395-96 (1918).

An amendment to Section 10(e) reveals that charges for the use of a navigation (government) dam were to be for the "utilization of power" created by the dam. Thus:

> "but in no case shall a license be issued free of charge for the development and utilization of power created by any navigation dam and that the amount charged therefor in any license shall be as nearly as possible that ascertained by the commission to be the value of such power." *Id.* at 7.

Clearly, the charge was to be only for the "value of such power," and not the value of water for consumption by irrigation, domestic, or steam plant uses.

The Committee on Water Power held extensive hearings on the substitute bill in 1918, and the 900 pages or so of testimony show that Congress was only concerned with development of the Nation's water power resources.[59] In response to questioning concerning non-power uses of water, Mr. Merrill, principal draftsman of the substitute bill, said:

> "Mr. MERRILL. . . . This bill is concerned only, in such instances, in the development of power. When that is done the licensee may make any other use that is available.
>
> "Mr. RAKER. But the bill simply gives him a license for power purposes?
>
> "Mr. MERRILL. Yes."
>
> *Hearings on S. 1419 Before the House Committee on Water Power*, 65th Cong., 2d Sess. 89 (1918).

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[59] One argument for developing water power, repeatedly made, was that it would conserve coal, oil, and gas used by steam plants. *E.g.*, 56 CONG. REC. 276, 283, 9112, 9313 (1918). Manifestly, the bill did not have as its purpose development of projects to supply water for expansion of the use of these fuels in steam plants, but to foster the use of substitute water power.

Congressman Raker was concerned about the fact that the bill lacked any provision for the development of irrigation:

> "Mr. RAKER. Are you so sure that there ought not to be a provision in here so that arrangements could be made to handle that?
>
> "Mr. MERRILL. I do not think it is necessary at all. I do not see how there can be any question about it whatever. *The only thing this bill is doing is to grant a license for that particular power development occupying the public lands.* There is no assumption of any control whatever over any other uses the licensee may make of that water outside of that development." *Id.* at 89-90 (emphasis added).

An exchange between Congressman Taylor and Mr. Townley, assistant to the president of the Westinghouse Electric and Manufacturing Company, expressly indicates that steam plants were to be excluded from the bill:

> "Mr. TAYLOR. You have spoken about the handicaps that are against water power development as compared with steam. The steam plants are not subjected—or will not be subjected, generally speaking—to the governmental regulations that this bill provides for will they?
>
> "Mr. TOWNLEY. No, sir.
>
> "Mr. TAYLOR. And they will not be subjected either to the payment of Federal royalties?
>
> "Mr. TOWNLEY. No, sir."
>
> *Hearings on S. 1419 Before the House Committee on Water Power,* 65th Cong., 2d Sess. 179 (1918).

The substitute bill was passed by the House, and referred to a conference committee. The conference

report proposed no changes from the House substitute in the wording of Section 4(d), except for the substitution of the word "Government" for "navigation," with respect to federal dams.[51] The report was not acted upon.

Legislative proposals, 1919-20 (66th Congress)

A bill (H.R. 3184) which substantially corresponded to the House substitute bill considered in the previous session, as amended in conference, was introduced in the House of Representatives. No hearings were held on H.R. 3184, since Congress merely continued the unfinished business of the 65th Congress. H.R. Rep. No. 61, 66th Cong., 1st Sess. (1919).

Congressional debate on the 1920 Act in this session of Congress, although extensive, provides little illumination on the surplus water clause.[52] Reference in the debates to the surplus water clause continued to be confined to hydroelectric power generation. *E.g.*, 58 Cong. Rec. 2036 (1919) (remarks of Congressman Small re a moratorium on construction of power facilities by private parties at government dams; 59 Cong. Rec. 1041 (1920) (remarks of Senator Nelson re charges for use of a dam). Since the surplus water clause in the final act is virtually identical to the language of earlier legislative proposals, the intended

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[51] H.R. Rep. No. 1147, 65th Cong., 3d Sess. (1919); 57 Cong. Rec. 4630-35 (1919).

[52] The only significant amendment concerning surplus water was proposed by the Senate Commerce Committee, which recommended that the clause "from which flows surplus water not needed for Government purposes that may be disposed of under the provisions of this act" be deleted from the definition of "Government dam" in Section 3. The Senate agreed to the amendment without debate. 59 Cong. Rec. 1105 (1920).

scope of the clause as reaching only hydroelectric power had been settled.

The usage of the term "surplus water" has been clear, without exception, from 1888 until 1973. The term was always used solely in the context of hydroelectric power generation in the early acts of Congress, in the bills leading to the 1920 act, and in the congressional debates. Never once was licensing of any other use of surplus water ever proposed. Certainly if Congress had intended the FPC to regulate consumptive uses, *i.e.*, irrigation, domestic, or fossil-fuel steam plants, words to that effect would appear in the early acts, proposed bills, and congressional debates, hearings, or reports. There are none. To conclude that Congress intended to regulate consumptive use of surplus water by steam plants amounts to unfounded speculation, and, in this case, judicial legislation.

B. Contrary to the court of appeals' assumption, the Federal Power Commission did not inherit the broad "spectrum" of responsibilities for water use planning that had been previously assigned to the Waterways Commission. Those responsibilities, in any event, did not include issuing licenses for water power, steam power, or any other water uses.

The court of appeals bolstered its holding on the surplus water clause by asserting that the Federal Power Commission was intended by Congress to assume the duties and authority of the Waterways Commission, which was abolished by Section 29 of the Federal Water Power Act. The court stated:

> "The Act of 1917 [an Act establishing the Waterways Commission] was explicitly repealed by the Act of 1920, and the newly created Federal Power Commission took over the planning and coordination responsibilities of the Waterways Com-

> mission, which included consideraton of a spectrum of water uses not related to water power." (Footnotes omitted.) [53] App. 107.

The court of appeals, citing absolutely no authority for this proposition, used its assertion that Congress transferred to the FPC jurisdiction over "a spectrum of water uses" as a premise for the conclusion that:

> "[T]he 'surplus water' provision was intended to serve broader interests than the 'constructing, operating, and maintaining' clause, which was intended only to regulate nonfederal hydroelectric projects. It reflects an explicit concern with utilizing water resources to defray the cost of waterway improvements [54] as well as a concern with comprehensive water resource management. It empowers the FPC to license the use of either 'surplus water' or 'water power' from *any* Government dam, and thus is not limited to the mere leasing of excess Government water power." App. 109.

The legislative history of both acts contradicts the court of appeals assumption. The history shows (i) that the Waterways Commission's duties were restricted to conducting investigations and issuing reports; (ii) that the Commission lacked authority to issue licenses or permits for water power generation, much less steam power generation; and (iii) that the Waterways Commission's responsibilities were not

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[53] Contrary to the court's statement, the Federal Water Power Act did not repeal the 1917 Act, but only section 18 which created the Waterways Commission.

[54] (Our footnote.) As noted earlier, the Colorado River legislation earmarks the Secretary's receipts from disposition of water and power for special funds in the Colorado River Basin, not the national funds named in Section 17 of the Federal Power Act.

transferred to the Federal Power Commission. The history, chronologically, is as follows:

The Waterways Commission was established by Section 18 of the Rivers and Harbors Act of 1917, ch. 49, 40 Stat. 250. The Commission's scope over water matters was broad, but its duties were advisory, its functions being limited to coordinating efforts of government agencies, conducting investigations, and issuing reports and recommendations. Members were never appointed, so the Commission never functioned. The Commission's intended duties were as follows:

> "[T]o bring into coordination and cooperation the engineering, scientific, and constructive services, bureaus, boards, and commissions of the several governmental departments of the United States and commissions created by Congress that relate to study, development, or control of waterways and water resources and subjects related thereto, or to the development and regulation of interstate and foreign commerce, with a view to uniting such services in investigating, with respect to all watersheds in the United States, questions relating to the development, improvement, regulation, and control of navigation as a part of interstate and foreign commerce, including therein the related questions of irrigation, drainage, forestry, arid and swamp land reclamation, clarification of streams, regulation of flow, control of floods, utilization of water power, prevention of soil erosion and waste, storage, and conservation of water for agricultural, industrial, municipal, and domestic uses, cooperation of railways and waterways, and promotion of terminal and transfer facilities, to secure the necessary data, and to formulate and report to Congress, as early as practicable, a comprehensive plan or plans for the development of waterways and the water resources of the United States for the purposes of navigation and for every useful purpose,

> and recommendations for the modification or discontinuance of any project herein or heretofore adopted." 40 Stat. 250, 269.

Clearly, this act did not confer authority on the Waterways Commission to issue licenses or permits for water uses, and in particular for consumptive uses by steam plants. This statutory reading is confirmed by the views of members of Congress.

In discussing a proposed amendment by Mr. Humphreys to place the Waterways Commission in charge of the pending water power act, the following exchange in 1918 reveals the limited authority of the Waterways Commission:

> "MR. RAKER. The power given the commission in the river and harbor act relates soley to investigation and report, does it not?
>
> "Mr. HUMPHREYS. Yes.
>
> "Mr. RAKER. While this bill [House substitute to S. 1419] authorizes the granting of permits and licenses.
>
> "Mr. HUMPHREYS. Yes." 56 CONG. REC. 9658 (1918).

This understanding of the Waterways Commission's authority was confirmed in further discussions in the House:

> "Mr. FERRIS. Does the gentleman contend that the Waterways Commission, created by the Newlands amendment, has any power to issue franchises for water power?
>
> "Mr. HUMPHREYS. Not a bit." *Id.* at 9661-62.

The amendment offered by Congressman Humphreys was then rejected.[55] *Id.* at 9663.

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[55] Mr. Humphreys tried again in 1919 to place the Waterways Commission in charge of the Federal Water Power Act. That effort failed. 58 CONG. REC. 2026-27 (1919).

In July, 1919, Congressman Anderson proposed an amendment to repeal the legislation authorizing appointment of the Waterways Commission. 58 CONG. REC. 2250 (1919). It read:

> "That section 18 of an act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes, approved August 8, 1917, is hereby repealed." *Id.*

The debate on the House floor reveals that the Waterways Commission's authority was repealed, *inter alia*, because it was not a functioning agency, not, as the court of appeals assumed, to give the FPC jurisdiction over all areas of interest to the defunct Commission. *E.g.*, 58 CONG. REC. 2250-51 (1919). The repealing amendment was passed. *Id.* A second vote on the amendment was taken later on the same day, and again it was passed, without debate. *Id.* at 2262. The amendment was retained in identical form in Section 29 of the Federal Water Power Act as enacted.

The Senate, in 1920, aware that the House had voted to repeal the Waterways Commission, aware that the Commission's duties were primarily to investigate and report, and aware that the Commission was not functioning, discussed the possibility of transferring all of the Waterways Commission's powers to the Federal Power Commission. 59 CONG. REC. 1172-76 (1920). Senator Ashurst stated that he would "propose at the appropriate time an amendment" which would read:

> "And all authority and power conferred and duties imposed . . . upon the Federal water-power commission, which, in the discharge of the same, shall be subject to all the requirements of said section 18 governing the commission referred therein." *Id.* at 1173.

Senator Ashurst's proposal was never introduced as an amendment, and never discussed again.

As we have shown, the defunct Waterways Commission's duties were confined to making investigations and reports; it had no authority to license uses of water for hydroelectric generation, and certainly not for steam power generation. Furthermore, contrary to the court of appeals assumption, the repeal of the Waterways Commission was not intended to transfer all of that Commission's functions to the FPC. Indeed, the opposite is true.

Clearly, the court of appeals bridge, which it constructed to link the Waterways Commission's duties to the court's holding on surplus water, and to transport thereon a cargo of jurisdiction as a legacy from the expiring Commission to the new one, collapses under the weight of the legislative history.

CONCLUSION

We submit that:

1. It would be appropriate for this Court to reverse and vacate the judgment below as moot, without reaching the issue of interpretation of Section 4(e) of the Federal Power Act. There are two reasons for this:

A. Legislation subsequent to the Federal Water Power Act of 1920 superseded Section 4(e) of that act with respect to the consumptive use of water from government dams in the Colorado River Basin (if, indeed, Section 4(e) ever gave the Commission such jurisdiction), and vested all federal authority with respect to such consumptive use in the Secretary of the Interior, who has exercised it in executing comprehensive contracts for the storage and delivery of water for use in

the plants involved here which use water from government dams.

B. All of the complainants lack standing to litigate the issue of whether the Secretary or the Commission is empowered to control the consumptive use of water stored by government dams in the Colorado River Basin.

2. If, however, the Court decides to consider, on the merits, the conclusions reached by the court of appeals with respect to the interpretation of Section 4(e), it should affirm that portion of the opinion which holds that the Commission does not have jurisdiction to license steam-electric generating plants as "project works" in consequence of their use of the waters of navigable streams, but should reverse the holding that Section 4(e) authorizes the licensing of the use by steam plants of surplus water from government dams.

3. In any event, remand to the Commission, ordered by the court of appeals, is not warranted. All of the questions involved are questions of law for resolution by the Court.

Respectfully submitted,

NORTHCUTT ELY
FREDERICK H. RITTS
Law Offices of Northcutt Ely
Watergate 600 Building
Washington, D. C. 20037
and
HARRY A. POTH, JR.
PEYTON G. BOWMAN, 3RD
Reid & Priest
40 Wall Street, New York
N.Y. 10005

1701 K Street, N. W.
Washington, D. C. 20006
Attorneys for all Petitioners

NICHOLAS H. POWELL
Snell & Wilmer
400 Security Building
Phoenix, Arizona 85004
Attorneys for Arizona Public Service Company

WILLIAM DUNCAN
Kemp, Smith, White, Duncan & Hammond
P. O. Box 2800
El Paso, Texas 79999
Attorneys for El Paso Electric Company

BURT S. PINES, City Attorney
EDWARD C. FARRELL, Chief Assistant City Attorney for Water and Power

RALPH GUY JESSON
Assistant City Attorney
111 North Hope Street
Los Angeles, California 90051
Attorneys for Department of Water and Power, City of Los Angeles

M. GENE MATTEUCCI
P. O. Box 230
Las Vegas, Nevada 89101
Attorney for Nevada Power Company

REX E. LEE
2840 Iroquois Drive
Provo, Utah 84601
Jennings, Strouss & Salmon
111 W. Monroe Street
Phoenix, Arizona 85003
Attorneys for Salt River Project Agricultural Improvement and Power District

SHERMAN CHICKERING
C. HAYDEN AMES
EDWARD P. NELSEN
ALLAN J. THOMPSON
Chickering & Gregory
111 Sutter Street
San Francisco, California 94104
Attorneys for San Diego Gas & Electric Company

JOHN R. BURY
Assistant General Counsel
P.O. Box 800
Rosemead, California 91770
Attorney for Southern California Edison Company

L. V. ROBERTSON, JR.
General Attorney
Tucson Gas and Electric Company
220 West Sixth Street
Tucson, Arizona 85703

DONALD E. DICKERMAN
Holesapple, Conner, Jones, McFall & Johnson
P.O. Box 310
Tucson, Arizona 85702
Attorneys for Tucson Gas & Electric Company

SIDNEY G. BAUCOM
ROBERT GORDON
P.O. Box 899
Salt Lake City, Utah 84110
Attorneys for Utah Power & Light Company

ATTACHMENT A

STATUTORY PROVISIONS

Federal Power Act

Section 4(e) of the Federal Power Act, 16 U.S.C. Section 797(e) provides:

"[Sec. 797] The Commission is authorized and empowered—

* * * * *

"(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided*, That licenses shall be issued within any reservation only after a finding by the commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations: *Provided further*, That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the commission, desirable and justified in the public interest for the pur-

pose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the commission and shall become a part of the records of the commission: *Provided further,* That in case the commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further,* That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection."

Section 10(e) of the Federal Power Act, 16 U.S.C. Section 803(e), provides:

(e) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of sections 792, 793, 795-818, and 820-823 of this title; for recompensing it for the use, occupancy, and enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the Commission shall seek to avoid increasing the price to the consumers of power by such charges, and any such charges may be adjusted from time to time by the Commission as conditions may require: *Provided,* That when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the Commission shall, subject to the approval of the Secretary of the Interior in the case of such dams or structures in reclamation projects and, in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands

as provided in section 476 of Title 25, fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter upon notice and opportunity for hearing: *Provided further,* That licenses for the development, transmission or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for State or municipal purposes, except that as to projects constructed or to be constructed by States or municipalities primarily designed to provide or improve navigation, licenses therefor shall be issued without charge; and that licenses for the development, transmission, or distribution of power for domestic, mining, or other beneficial use in projects of not more than two thousand horsepower installed capacity may be issued without charge, except on tribal lands within Indian reservations; but in no case shall a license be issued free of charge for the development and utilization of power created by any Government dam and that the amount charged therefor in any license shall be such as determined by the Commission. In the event an overpayment of any charge due under this section shall be made by a licensee, the Commission is authorized to allow a credit for such overpayment when charges are due for any subsequent period.

Section 23(b) of the Federal Power Act, 16 U.S.C. Section 817, provides:

"It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior

to June 10, 1920, or a license granted pursuant to this chapter. Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part therof, other than those defined in this chapter as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this chapter. If the Commission shall not so find, and if no public lands or reservations are affected, permission is granted to construct such dam or other project works in such stream upon compliance with State laws. June 10, 1920, c. 285, § 23, 41 Stat. 1075; Aug. 26, 1935, c. 687, Title II, § 210, 49 Stat. 846."

Boulder Canyon Project Act

Section 5 of the Boulder Canyon Project Act, 43 U.S.C. § 617d, provides in part:

"Sec. 5. That the Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon, for irrigation and domestic uses, and generation of electrical energy and delivery at the switchboard to States, municipal corporations, political subdivisions, and private corporations of electrical energy generated at said dam, upon charges that will provide revenue which, in addition to other revenue accruing under the reclamation law and under this Act, will in his judgment cover all expenses of operation and maintenance incurred by the United States

on account of works constructed under this Act and the payments to the United States under subdivision (b) of section 4. Contracts respecting water for irrigation and domestic uses shall be for permanent service and shall conform to paragraph (a) of section 4 of this Act. No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.

Section 6 of the Boulder Canyon Project Act, 43 U.S.C. § 617e, provides:

> The dam and reservoir provided for by section 617 of this title shall be used: First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River compact; and third, for power. The title to said dam, reservoir, plant, and incidental works shall forever remain in the United States, and the United States shall, until otherwise provided by Congress, control, manage, and operate the same, except as herein otherwise provided: *Provided, however,* That the Secretary of the Interior may, in his discretion, enter into contracts of lease of a unit or units of any Government-built plant, with right to generate electrical energy, or alternatively, to enter into contracts of lease for the use of water for the generation of electrical energy as herein provided, in either of which events the provisions of section 617d of this title relating to revenue, term, renewals, determination of conflicting applications, and joint use of transmission lines under contracts for the sale of electrical energy, shall apply.
>
> The Secretary of the Interior shall prescribe and enforce rules and regulations conforming with the requirements of the Federal Power Act, so far as applicable, respecting maintenance of works in condition of repair adequate for their efficient operation, maintenance of a system of accounting, control of rates and service in the absence of State regulation or interstate agreement, valuation for rate-making purposes, transfers of contracts, contracts extending beyond the lease period, expropriation of excessive profits, recapture

and/or emergency use by the United States of property of lessees, and penalties for enforcing regulations made under this subchapter or penalizing failure to comply with such regulations or with the provisions of this subchapter. He shall also conform with other provisions of the Federal Power Act and of the rules and regulations of the Federal Power Commission, which have been devised or which may be hereafter devised, for the protection of the investor and consumer.

The Federal Power Commission is hereby directed not to issue or approve any permits or licenses under said Federal Power Act upon or affecting the Colorado River or any of its tributaries, except the Gila River, in the States of Colorado, Wyoming, Utah, New Mexico, Nevada, Arizona, and California until this subchapter shall become effective as provided in section 617c of this title.

Section 8 of the Boulder Canyon Project Act, 43 U.S.C. Section 617g, provides:

(a) The United States, its permittees, licensees, and contractees, and all users and appropriators of water stored, diverted, carried, and/or distributed by the reservoir, canals, and other works herein authorized, shall observe and be subject to and controlled by said Colorado River compact in the construction, management, and operation of said reservoir, canals, and other works and the storage, diversion, delivery, and use of water for the generation of power, irrigation, and other purposes, anything in this subchapter to the contrary notwithstanding, and all permits, licenses, and contracts shall so provide.

(b) Also the United States, in constructing, managing, and operating the dam, reservoir, canals and other works herein authorized, including the appropriation, delivery, and use of water for the generation of power, irrigation, or other uses, and all users of water thus delivered and all users and appropriators of waters stored by said reservoir and/or carried by said canal, including all permittees and licensees of the United States or any of its agencies, shall observe and be subject to and controlled, anything to the contrary herein notwithstanding, by the terms of such compact,

if any, between the States of Arizona, California, and Nevada, or any two thereof, for the equitable division of the benefits, including power, arising from the use of water accruing to said States, subsidiary to and consistent with said Colorado River compact, which may have been negotiated and approved by said States and to which Congress shall have given its consent and approval on or before January 1, 1929; and the terms of any such compact concluded between said States and approved and consented to by Congress after said date: *Provided*, That in the latter case such compact shall be subject to all contracts, if any, made by the Secretary of the Interior under section 617d of this title prior to the date of such approval and consent by Congress.

Reclamation Project Act of 1939

Section 9(c) of the Reclamation Project Act of 1939, 43 U.S.C. § 485h(c), provides:

"(c) The Secretary is authorized to enter into contracts to furnish water for municipal water supply or miscellaneous purposes: *Provided*, That any such contract either (1) shall require repayment to the United States, over a period of not to exceed forty years from the year in which water is first delivered for the use of the contracting party, with interest not exceeding the rate of 3½ per centum per annum if the Secretary determines an interest charge to be proper, of an appropriate share as determined by the Secretary of that part of the construction costs allocated by him to municipal water supply or other miscellaneous purposes; or (2) shall be for such periods, not to exceed forty years, and at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper, and shall require the payment of said rates each year in advance of delivery of water for said year. Any sale of electric power or lease of power privileges, made by the Secretary in connection with the operation of any project or division of a project, shall be for such periods, not to exceed forty years, and at such rates as

in his judgment will produce power revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost, interest on an appropriate share of the construction investment at not less than 3 per centum per annum, and such other fixed charges as the Secretary deems proper: *Provided further*, That in said sales or leases preference shall be given to municipalities and other public corporations or agencies; and also to cooperatives and other nonprofit organizations financed in whole or in part by loans made pursuant to the Rural Electrification Act of 1936. Nothing in this subsection shall be applicable to provisions in existing contracts, made pursuant to law, for the use of power and miscellaneous revenues of a project for the benefit of users of water from such project. The provisions of this subsection respecting the terms of sales of electric power and leases of power privileges shall be in addition and alternative to any authority in existing laws relating to particular projects. No contract relating to municipal water supply or miscellaneous purposes or to electric power or power privileges shall be made unless, in the judgment of the Secretary, it will not impair the efficiency of the project for irrigation purposes."

Colorado River Storage Project Act

Section 4 and 14 of the Colorado River Storage Project Act, 43 U.S.C. §§ 620c, 620m, provide:

"Sec. 4. Except as otherwise provided in this Act, in constructing, operating, and maintaining the units of the Colorado River storage project and the participating projects listed in section 1 of this Act, the Secretary shall be governed by the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto): *Provided*, That (a) irrigation repayment contracts shall be entered into which, except as otherwise provided for the Paonia and Eden projects, provide for repayment of the obligation assumed thereunder with respect to any project contract unit over a period of not more than fifty years exclusive of any development period authorized by law; (b) prior to construction of irrigation distribution facilities, repayment contracts

shall be made with an 'organization' as defined in paragraph 2(g) of the Reclamation Project Act of 1939 (53 Stat. 1187) which has the capacity to levy assessments upon all taxable real property located within its boundaries to assist in making repayments, except where a substantial proportion of the lands to be served are owned by the United States; (c) contracts relating to municipal water supply may be made without regard to the limitations of the last sentence of section 9(c) of the Reclamation Project Act of 1939; and (d), as to Indian lands within, under or served by any participating project, payment of construction costs within the capability of the land to repay shall be subject to the Act of July 1, 1932 (47 Stat. 564): *Provided further*, That for a period of ten years from the date of enactment of this Act, no water from any participating project authorized by this Act shall be delivered to any water user for the production on newly irrigated lands of any basic agricultural commodity, as defined in the Agricultural Act of 1949, or any amendment thereof, if the total supply of such commodity for the marketing year in which the bulk of the crop would normally be marketed is in excess of the normal supply as defined in section 301(b) (10) of the Agricultural Adjustment Act of 1938, as amended, unless the Secretary of Agriculture calls for an increase in production of such commodity in the interest of national security. All units and participating projects shall be subject to the apportionments of the use of water between the Upper and Lower Basins of the Colorado River and among the States of the Upper Basin fixed in the Colorado River Compact and the Upper Colorado River Basin Compact, respectively, and to the terms of the treaty with the United Mexican States (Treaty Series 994).

* * * * *

"Sec. 14. In the operation and maintenance of all facilities, authorized by Federal law and under the jurisdiction and supervision of the Secretary of the Interior, in the basin of the Colorado River, the Secretary of the Interior is directed to comply with the applicable provisions of the Colorado River Compact, the Upper Colorado River Basin Compact, the Boulder Canyon Project Act, the Boulder Canyon Project Ad-

justment Act, and the Treaty with the United Mexican States, in the storage and release of water from reservoirs in the Colorado River Basin. In the event of the failure of the Secretary of the Interior to so comply, any State of the Colorado River Basin may maintain an action in the Supreme Court of the United States to enforce the provisions of this section, and consent is given to the joinder of the United States as a party in such suit or suits, as a defendant or otherwise."

Navajo-San Juan Chama Project Act

Sections 11(a), (b), 13(a), (b), 14 of the Navajo-San Juan Chama Project Act, 43 U.S.C. §§ 615ss(a), (b), 615uu (a), (b), 615vv provide:

Sec. 615ss(a), (b):

"(a) No person shall have or be entitled to have the use for any purpose, including uses under the Navajo Indian irrigation project and the San Juan-Chama project authorized by sections 615jj and 615pp of this title, of water stored in Navajo Reservoir or of any other waters of the San Juan River and its tributaries originating above Navajo Reservoir to the use of which the United States is entitled under these projects except under contract satisfactory to the Secretary and conforming to the provisions of sections 615ii-615yy of this title. Such contracts, which, in the case of water for Indian uses, shall be executed with the Navajo Tribe, shall make provision, in any year in which the Secretary anticipates a shortage, taking into account both prospective runoff originating above Navajo Reservoir and the available water in storage in Navajo Reservoir, for a sharing of the available water in the following manner: The prospective runoff shall be apportioned between the contractors diverting above and those diverting at or below Navajo Reservoir in the proportion that the total normal diversion requirement of each group bears to the total of all normal diversion requirements. In the case of contractors diverting above Navajo Reservoir, each such contract shall provide for a sharing of the runoff apportioned to said group in the same proportion as the normal diversion requirement under said contract

bears to the total normal diversion requirements of all such contracts that have been made hereunder: *Provided*, That for any year in which the foregoing sharing procedure either would apportion to any contractor diverting above Navajo Reservoir an amount in excess of the runoff anticipated to be physically available at the point of his diversion, or would result in no water being available to one or more such contractors, the runoff apportioned to said group shall be reapportioned, as near as may be, among the contractors diverting above Navajo Reservoir in the proportion that the normal diversion requirements of each bears to the total normal diversion requirements of the group. In the case of contractors diverting from or below Navajo Reservoir, each such contract shall provide for a sharing of the remaining runoff together with the available storage in the same proportion as then normal diversion requirement under said contract bears to the total normal diversion requirements under all such contracts that have been made hereunder.

"The Secretary shall not enter into contracts for a total amount of water beyond that which, in his judgment, in the event of shortage, will result in a reasonable amount being available for the diversion requirements for the Navajo Indian irrigation project and the initial stage of the San Juan-Chama project as specified in sections 615jj and 615pp of this title.

"No long-term contract, except contracts for the benefit of the lands and for the purposes specified in sections 615jj and 615pp of this title, shall be entered into for the delivery of water stored in Navajo Reservoir or of any other waters of the San Juan River and its tributaries, as aforesaid, until the Secretary has determined by hydrologic investigations that sufficient water to fulfill said contract is reasonably likely to be available for use in the State of New Mexico during the term thereof under the allocations made in articles III and XIV of the Upper Colorado River Basin compact, and has submitted such determination to the Congress of the United States and the Congress has approved such contracts: *Provided*, That nothing contained in the foregoing shall be construed to forbid the Secretary from entering into temporary water

supply contracts in the San Juan River Basin for any year in which he determines that water legally available for use in the upper basin of the Colorado River system would otherwise not be used there and is not needed to fulfill the obligations of the upper division States with respect to delivery of water at Lee Ferry.

"(b) If contracts are entered into for delivery from storage in Navajo Reservoir of water not covered by subsection (a) of this section, such contracts shall be subject to the same provision for sharing of available water supply in the event of shortage as in the case of contracts required to be made pursuant to subsection (a) of this section.

Sec. 615uu(a), (b):

"(a) The use of water, including that diverted from the Colorado River system to the Rio Grande Basin, through works constructed under authority of sections 615ii-615yy of this title, shall be subject to and controlled by the Colorado River compact, the Upper Colorado River Basin compact, the Boulder Canyon Project Act, the Boulder Canyon Project Adjustment Act, the Colorado River Storage Project Act, and the Mexican Water Treaty (Treaty Series 994), and shall be included within and shall in no way increase the total quantity of water to the use of which the State of New Mexico is entitled and limited under said compacts, statutes, and treaty, and every contract entered into under sections 615ii-615yy of this title for the storage, use, and delivery of such water shall so recite.

"(b) All works constructed under authority of sections 615ii-615yy of this title, and all officers, employees, permittees, licensees, and contractees of the United States and of the State of New Mexico acting pursuant thereto and all users and appropriators of water of the Colorado River system diverted or delivered through the works constructed under authority of sections 615ii-615yy of this title and any enlargements or additions thereto shall observe and be subject to said compacts, statutes, and treaty, as hereinbefore provided, in the diversion, delivery, and use of water of the Colorado River system, and such condition and covenant shall attach as a matter of law whether or not set out or referred to in the instrument evidencing

such permit, license, or contract and shall be deemed to be for the benefit of and be available to the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming and the users of water therein or thereunder by way of suit, defense or otherwise in any litigation respecting the waters of the Colorado River system.

Sec. 615vv:

"In the operation and maintenance of all facilities under the jurisdiction and supervision of the Secretary of the Interior authorized by sections 615ii-615yy of this title, the Secretary is directed to comply with the applicable provisions of the Colorado River compact, the Upper Colorado River Basin compact, the Boulder Canyon Project Act, the Boulder Canyon Project Adjustment Act, the Colorado River Storage Project Act and the treaty with the United Mexican States in the storage and release of water from reservoirs in the Colorado River Basin. In the event of the failure of the Secretary of the Interior to so comply, any State of the Colorado River Basin may maintain an action in the Supreme Court of the United States to enforce the provisions of this section, and consent is given to the joinder of the United States as a party in such suit or suits, as a defendant or otherwise. Pub.L. 87-483, § 14, June 13, 1962, 76 Stat. 101."

Act of March 22, 1968, P.L. 90-272

Act of March 22, 1968, P.L. 90-272; 82 Stat. 52; U.S. Code Cong. & Admin. News at 63 (1968):

"NAVAJO RESERVOIR, NEW MEXICO—WATER DELIVERY CONTRACTS

"PUBLIC LAW 90-272; 82 STAT. 52

[S. J. Res. 123]

"Joint Resolution to approve long-term contracts for delivery of water from Navajo Reservoir in the State of New Mexico, and for other purposes.

"WHEREAS section 11(a) of the Act of June 13, 1962 (76 Stat. 96; Public Law 87-483), provides that: 'No long-term contract, except contracts for the benefit of the lands and for the purposes specified in sections

2 (Navajo Indian irrigation project) and 8 (San Juan-Chama project) of this Act, shall be entered into for the delivery of water stored in Navajo Reservoir or of any other waters of the San Juan River and its tributaries, as aforesaid, until the Secretary has determined by hydrologic investigation that sufficient water to fulfill said contract is reasonably likely to be available for use in the State of New Mexico during the term thereof under the allocations made in articles III and XIV of the Upper Colorado River Basin Compact, and has submitted such determination to the Congress of the United States and the Congress has approved such contracts'; and

"WHEREAS the Secretary has made such determination in conection with the following contracts transmitted to Congress by letter dated November 21, 1967:

	Water diversion (acre-feet)	Estimated water depletion (acre-feet)	Proposed uses
"Public Service Company of New Mexico	20,200	16,200	Thermal-electric generation.
"Southern Union Gas Company	50	50	Pump cooling
Utah Construction and Mining Company	44,000	35,300	Thermal-electric generation.
	64,250	51,550	

"Now, therefore, be it

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That:*

"Such contracts are hereby approved by the Congress. The Secretary may enter into amendments thereto which would in his judgment be in the interest of water conservation, but the total water depletion shall not exceed the estimates set forth in this joint resolution.

"Approved March 22, 1968."

Colorado River Basin Project Act

Sections 301(b), (c), and 303(a), (b), (c), (d) of the Colorado River Basin Project Act, 43 U.S.C. §§ 1521(b), (c), 1523(a), (b), (c), (d):

Sec. 1521(b), (c):

"(b) Article II(B) (3) of the decree of the Supreme Court of the United States in Arizona against California (376 U.S. 340) shall be so administered that in any year in which, as determined by the Secretary, there is insufficient main stream Colorado River water available for release to satisfy annual consumptive use of seven million five hundred thousand acre-feet in Arizona, California, and Nevada, diversions from the main stream for the Central Arizona Project shall be so limited as to assure the availability of water in quantities sufficient to provide for the aggregate annual consumptive use by holders of present perfected rights, by other users in the State of California served under existing contracts with the United States by diversion works heretofore constructed, and by other existing Federal reservations in that State, of four million four hundred thousand acre-feet of mainstream water, and by users of the same character in Arizona and Nevada. Water users in the State of Nevada shall not be required to bear shortages in any proportion greater than would have been imposed in the absence of this subsection. This subsection shall not affect the relative priorities, among themselves, of water users in Arizona, Nevada, and California which are senior to diversions for the Central Arizona Project, or amend any provisions of said decree.

"(c) The limitation stated in subsection (b) of this section shall not apply so long as the Secretary shall determine and proclaim that means are available and in operation which augment the water supply of the Colorado River system in such quantity as to make sufficient mainstream water available for release to satisfy annual consumptive use of seven million five hundred thousand acre-feet in Arizona, California, and Nevada.

* * * * *

Sec. 1523(a), (b), (c), (d):

"(a) The Secretary is authorized and directed to continue to a conclusion appropriate engineering and economic studies and to recommend the most feasible plan for the construction and operation of hydroelectric generating and transmission facilities, the purchase of electrical energy, the purchase of entitlement to electrical plant capacity, or any combination thereof, including participation, operation, or construction by non-Federal entities, for the purpose of supplying the power requirements of the Central Arizona Project and augmenting the Lower Colorado River Basin Development Fund: *Provided*, That nothing in this section or in this Act contained shall be construed to authorize the study or construction of any dams on the main stream of the Colorado River between Hoover Dam and Glen Canyon Dam.

"(b) If included as a part of the recommended plan, the Secretary may enter into agreements with non-Federal interests proposing to construct thermal generating powerplants whereby the United States shall acquire the right to such portions of their capacity, including delivery of power and energy over appurtenant transmission facilities to mutually agreed upon delivery points, as he determines is required in connection with the operation of the Central Arizona Project. When not required for the Central Arizona Project, the power and energy acquired by such agreements may be disposed of intermittently by the Secretary for other purposes at such prices as he may determine, including its marketing in conjunction with the sale of power and energy from Federal powerplants in the Colorado River system so as to produce the greatest practicable amount of power and energy that can be sold at firm power and energy rates. The agreements shall provide, among other things, that—

"(1) the United States shall pay not more than that portion of the total construction cost, exclusive of interest during construction, of the powerplants, and of any switchyards and transmission facilities serving the United States, as is represented by the ratios of the respective capacities to be provided for the United States therein to the total capacities of such facilities.

The Secretary shall make the Federal portion of such costs available to the non-Federal interests during the construction period, including the period of preparation of designs and specifications, in such installments as will facilitate a timely construction schedule, but no funds other than for preconstruction activities shall be made available by the Secretary until he determines that adequate contractual arrangements have been entered into between all the affected parties covering land, water, fuel supplies, power (its availability and use), rights-of-way, transmission facilities and all other necessary matters for the thermal generating powerplants;

"(2) annual operation and maintenance costs shall be apportioned between the United States and the non-Federal interests on an equitable basis taking into account the ratios determined in accordance with the foregoing clause (1): *Provided, however,* That the United States shall share on the foregoing basis in the depreciation component of such costs only to the extent of provision for depreciation on replacements financed by the non-Federal interests;

"(3) the United States shall be given appropriate credit for any interests in Federal lands administered by the Department of the Interior that are made available for the powerplants and appurtenances;

"(4) costs to be borne by the United States under clauses (1) and (2) shall not include (a) interest and interest during construction, (b) financing charges, (c) franchise fees, and (d) such other costs as shall be specified in the agreement.

"(c) No later than one year from September 30, 1968, the Secretary shall submit his recommended plan to the Congress. Except as authorized by subsection (b) of this section, such plan shall not become effective until approved by the Congress.

"(d) If any thermal generating plant referred to in subsection (b) of this section is located in Arizona, and if it is served by water diverted from the drainage area of the Colorado River system above Lee Ferry, other provisions of existing law to the contrary notwithstanding, such consumptive use of water shall be a part of the fifty thousand acre-feet per annum ap-

portioned to the State of Arizona by article III (a) of the Upper Colorado River Basin Compact (63 Stat. 31)."

Colorado River Compact

(H. Doc. 717, 80th Cong., pp. A19, A21)

"ARTICLE III

"(a) There is hereby apportioned from the Colorado River System in perpetuity to the Upper Basin and to the Lower Basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist.

* * * * *

"(d) The States of the Upper Division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre-feet for any period of ten consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of this compact.

"(e) The States of the Upper Division shall not withhold water, and the States of the Lower Division shall not require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses."

"ARTICLE VIII

"Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact. Whenever storage capacity of 5,000,000 acre-feet shall have been provided on the main Colorado River within or for the benefit of the Lower Basin, then claims of such rights, if any, by appropriators or users of water in the Lower Basin against appropriators or users of water in the Upper Basin shall attach to and be satisfied from water that may be stored not in conflict with Article III.

"All other rights to beneficial use of waters of the Colorado River System shall be satisfied solely from the water apportioned to that Basin in which they are situate."

Upper Colorado River Basin Compact

(H. Doc. 717, 80th Cong., p. A169)

"ARTICLE III

"(a) Subject to the provisions and limitations contained in the Colorado River Compact and in this Compact, there is hereby apportioned from the Upper Colorado River System in perpetuity to the States of Arizona, Colorado, New Mexico, Utah and Wyoming, respectively, the consumptive use of water as follows:

"(1) To the State of Arizona the consumptive use of 50,000 acre-feet of water per annum.

"(2) To the States of Colorado, New Mexico, Utah and Wyoming, respectively, the consumptive use per annum of the quantities resulting from the application of the following percentages to the total quantity of consumptive use per annum apportioned in perpetuity to and available for use each year by Upper Basin [*sic*] under the Colorado River Compact and remaining after the deduction of the use, not to exceed 50,000 acre-feet per annum, made in the State of Arizona.

State of Colorado ..... 51.75 percent,
State of New Mexico .... 11.25 percent,
State of Utah ..... 23.00 percent,
State of Wyoming ..... 14.00 percent."